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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

THE STATE OF OHIO,
Petitioner,

vs.

BILLY ROGERS, AKA RAYMOND LEE HUDSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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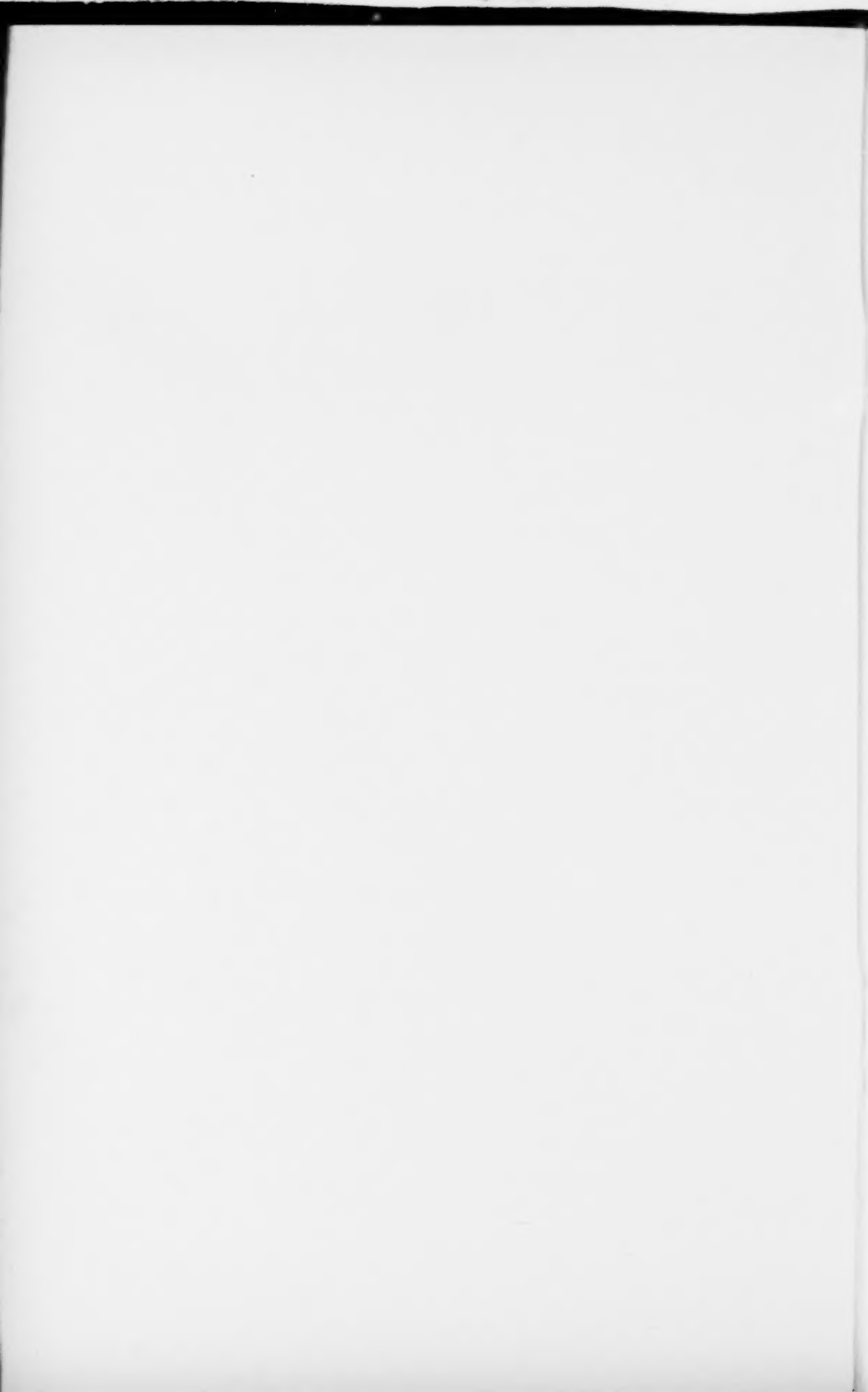
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QUESTIONS PRESENTED FOR REVIEW

- I. The Supreme Court of Ohio should not have retroactively applied *Wainwright v. Greenfield*, 474 U.S. (1986) to the present case.
- II. The Supreme Court of Ohio misapplied the harmless error doctrine as set forth in *United States v. Hasting*, 461 U.S. 499 (1983).
- III. *Wainwright v. Greenfield* should not apply to a fact situation when defense counsel elicits testimony that an accused asserted his Miranda rights and failed to object to the subsequent use of that information during trial.

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In the Supreme Court of the United States

October Term, 1987

THE STATE OF OHIO,
Petitioner,

vs.

BILLY ROGERS, AKA RAYMOND LEE HUDSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

The State of Ohio, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in this matter on August 12, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio reversing the conviction and death sentence of the Respondent is reported at 32 Ohio St. 3d 70 (1987). The opinion is reproduced in the Appendix to this Petition at pages A1-A10.

The opinions of the Supreme Court of Ohio affirming the conviction and death sentence of the Respondent are reported at 28 Ohio St. 3d 427 (1986) and 17 Ohio St.

3d 174 (1985). These are reported in the Appendix at pages A12-A29 and A32-A58.

The opinion of the Court of Appeals of Ohio (Sixth District) is not reported but is reproduced in the Appendix at pages A61-A122.

The opinion of the Court of Common Pleas of Lucas County is not reported but is reproduced in the Appendix at pages A125-A146.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered judgment reversing a conviction and setting aside a death sentence on August 12, 1987.

Jurisdiction of the Court is invoked under Title 28, Section 1257 United States Code.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The facts of this brutal kidnap-rape-murder are set forth in *State v. Rogers*, 17 Ohio St. 3d 174-175 (1985). The Respondent was arrested after the body of a seven-year-old was found in his bedroom closet. An officer gave him his "Miranda" rights but he was not questioned.

He was then taken to police headquarters where he was interviewed by Detective Arthur Marx. Detective Marx did not mention Rogers' assertion of the right to counsel on direct examination. On cross-examination, defense counsel deliberately elicited testimony from the detective regarding this assertion of wanting counsel and even went through Rogers' actions in attempting to contact an attorney. Detective Marx even made sure counsel wanted him to testify about this subject.

"(Cross examination of Toledo Police Officer Marx by Mr. Callahan, counsel for respondent.)

Q. Officer Marx, Mr. Yavorcik in his Direct Examination of you earlier said that you were the chief investigating officer of this case; is that the correct term for your function in this case?

A. Yes, sir.

Q. Thank you. Now, when you talked with Billy Rogers on the morning of November 15, 1981, did you go beyond the questions that you testified that you asked him on Direct Examination?

A. Yes.

Q. I believe they extended from his name and address through what his education was?

A. Yes, I did.

Q. You went further than that?

A. I did.

Q. What else did you ask him?

A. *Are you referring to the rights?*

Q. Yes.

A. Yes, I did.

Q. When did you give him his rights?

A. At approximately 2:00 a.m. I asked Mr. Rogers to read aloud to me from the waiver of rights form.

Q. And did he read it to you?

A. Yes, he did.

Q. Did he have difficulty reading it?

A. Not to the degree that it was noticeable that I took a note indicating so.

Q. But you were able to understand what he said?

A. That's correct.

Q. Now, that was the second time he had been given his rights that evening? Do you know that the officers at the scene gave him his rights?

A. I did not know that.

Q. Then you asked him questions about the incident of the evening, is that correct?

A. Yes.

Q. What did he tell you?

A. I asked Mr. Rogers to tell me why he had been brought to the police station. His comment was that the officers brought him to the station. He continued and he stated that his landlord—he didn't name him. He stated the landlord came to the door, and he, Mr. Rogers, let the landlord in. Two or three minutes later the officers came. He didn't know that anyone was in his apartment and he didn't know why he was brought to the Safety Building. At that point is when I informed him that he was brought to the Safety Building because the little girl's body had been found in his closet. That was—it was at that point in time that we went through the Miranda rights.

Q. *And what did he say after you had given him his Miranda rights?*

A. His comment to me after reading the third paragraph, and I would quote, *'I would like talk to an attorney first.'*

Q. That's what he said?

A. Yes, sir.

Q. Of course that was his right to do that, was it not?

A. That's correct.

Q. And you respected that?

A. That's correct.

There obviously was no objection to this testimony nor were there objections when the evidence was subsequently utilized with witnesses or commented during closing. There also was an abandonment of the issue until counsel

raised it upon remand from this Court dealing with a totally separate issue. The Ohio Supreme Court initially ruled this was *res judicata* but later *sua sponte* agreed to reconsider the issue. On August 12, 1987, the Ohio Supreme Court reversed the conviction and set aside the death penalty based upon *Wainwright v. Greenfield*, 474 U.S. (1986).

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE SUPREME COURT OF OHIO SHOULD NOT HAVE RETROACTIVELY APPLIED WAINWRIGHT v. GREENFIELD TO THE PRESENT CASE.

The present case before the Court deals with a homicide which occurred on November 14, 1981. The jury convicted the Respondent on September 22, 1982 and recommended the death penalty on September 29, 1982. On October 29, 1982, the trial judge imposed the sentence. On March 9, 1984, the Sixth District Court of Appeals upheld the conviction and on June 5, 1985 the Ohio Supreme Court upheld the conviction. On December 2, 1985 this Court remanded the case to the Ohio Supreme Court for consideration of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and on December 30, 1986 the Ohio Supreme Court reaffirmed the conviction.

On March 16, 1987, the Ohio Supreme Court *sua sponte* agreed to reconsider the case based upon *Wainwright v. Greenfield* which had been decided on January 14, 1986. The Respondent had not raised this issue in the Ohio Supreme Court on the initial appeal. The issue presented by the most recent Ohio decision questions whether *Wainwright, supra* should be given prospective or retroactive application.

The Petitioner would respectfully represent that the Ohio Supreme Court improperly applied *Wainwright*, *supra* retroactively to the present case. Since 1965, the United States Supreme Court's announcement of a constitutional rule in the realm of criminal procedure has frequently been followed by a separate decision explaining whether the rule applies to past, pending and future cases. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975).

In *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966), this Court applied the Linkletter test to hold that the Fifth Amendment rule of *Griffin v. California*, 380 U.S. 609 (1965) which barred comment on the Defendant's failure to testify to be nonretroactive. This case is a comment on the Defendant's silence and should not be applied retroactively.

Recently in *United States v. Johnson*, U.S. (1982) this Court attempted to narrow three categories of cases dealing with the retroactivity issue. First, were cases that applied well settled precedents to new and different factual situations. These cases were applied because the later decision did not alter the rule in any material way.

Second, in cases where this Court has expressly declared a rule of criminal procedure to be "a clear break with the past," *Desist v. United States*, 394 U.S. 244, 248 (1969), it invariably has gone on to find the new principle nonretroactive.

Third, this Court has recognized full retroactivity if the trial court lacked authority to convict or punish a criminal defendant in the first place.

The ruling in *Wainwright, supra*, did not simply apply settled precedent to a new set of facts but rather engaged in an entirely new and unanticipated principle of law. Therefore, the ruling in *Wainwright, supra* should not have been applied to the present case.

II. THE SUPREME COURT OF OHIO MISAPPLIED THE HARMLESS ERROR DOCTRINE AS SET FORTH IN UNITED STATES v. HASTING, 461 U.S. 499 (1983).

The Ohio Supreme Court in *State v. Zimmerman*, 18 Ohio St. 3d 43 (1983) held that in determining whether a prosecutor's reference to an accused's silence requires reversal, courts must apply the "harmless error" doctrine. This followed this Court's holding in *United States v. Hasting*, 461 U.S. 499 (1983).

As Chief Justice Rehnquist noted in the concurring opinion in *Wainwright v. Greenfield*:

"I think an important factor apparently not considered by the Court of Appeals was that the testimony on which the summation was based had already come in without objection. It was there for the jury to consider on its own regardless of whether the prosecutor ever mentioned it. This fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt. See *Cupp v. Naughten*, 414 U.S. 141 (1973); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). As the Court points out, however, *ante*, at 640-641, n. 13, the Attorney General has not contested the Court of Appeals' conclusion that any error was not harmless. Accordingly, I concur in the result." 106 S. Ct. at 644.

In the present case, counsel for the Respondent sought to elicit the responses to the Miranda warnings including his right to silence and his request for counsel. *Ohio v. Rogers*, 32 Ohio St. 3d 70, 71 (1987) (Appendix A4). The Ohio Supreme Court reversed the conviction based upon *Wainwright v. Greenfield*, 474 U.S. (1986) relying upon *Doyle v. Ohio*, 426 U.S. 610 (1976).

In the present case, the State did not use "silence" as set forth in *Doyle*, *supra* against him at trial but rather the request for counsel. The reliance upon *Doyle*, *supra* and the "plain error" analysis was misplaced. The Ohio Supreme Court should have applied the "harmless error" doctrine as set forth in *Chapman v. California*, 386 U.S. 18 (1967) and *United States v. Hasting*, 461 U.S. 499 (1983).

An analysis of the "harmless error" doctrine should begin with this Court's holding in *Griffin v. California*, 380 U.S. 609 (1965). The Court held that the constitutional provision permitting prosecutorial comment on the failure of the accused to testify violated the Fifth Amendment.

However, soon after *Griffin*, *supra*, this Court decided *Chapman v. California*, 386 U.S. 18 (1967) which involved prosecutorial comment on the Defendant's failure to testify in a trial conducted before *Griffin*, *supra* was decided. This Court in *Chapman*, *supra*, rejected a per se rule and adopted a "harmless error" rule based upon the entire record.

In examining this rule, the *Chapman*, *supra* Court stated:

"All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside con-

victions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional error which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." 386 U.S., at 22.

Since *Chapman*, *supra*, as followed in *Hasting*, *supra*, this Court has consistently made clear to the reviewing courts that their duty was to consider the whole trial record and to ignore errors that are harmless, including most constitutional violations. *Brown v. United States*, 411 U.S. 223, 230 (1973); *Harrington v. California*, 395 U.S. 250 (1969); *Milton v. Wainwright*, 407 U.S. 371 (1972).

The State submits that a guilty verdict was compelled by the overwhelming evidence of guilt and the total breakdown of Respondent's insanity defense. The Ohio Supreme Court looked to a few isolated sentences in 56 pages of transcribed argument by the prosecutors. They neglected all of the damning evidence which caused the insanity plea to be rejected. Such as:

Rogers' luring the victim to his apartment after performing magic tricks for children on the sidewalk.

Rogers' waiting until all other children were gone before taking her upstairs to his apartment.

Rogers' taking the time to tie a piece of rope to a necktie (rather than impulsively grabbing the first item he could find) to assist him in strangling the victim.

Rogers' placing vaseline on the victim's genital area.

Rogers' deliberate attempt to redress Lisa Bates after killing her and hiding the girl's body.

Rogers' admissions to a cellmate that he wanted to dump the body in an alley after it got dark.

When confronted with these facts, defense psychiatrist, Dr. Gerd Leopoldt, actually changed his opinion on the witness stand during cross-examination (See T. 1763, 1765, 1773-1777, 1783). Even on direct examination Dr. Leopoldt stated that it was his opinion that Rogers intended to sexually abuse the girl (T. 1739). Dr. Charlene Cassell, a psychologist, and Dr. Thomas Sherman, a psychiatrist, both testified in rebuttal that the Appellant was legally sane at the time of the offense (T. 1876 and 1949). Furthermore, the State produced several lay witnesses who testified to Billy Rogers' ability to function in society (See trial court's opinion for summary of the evidence).

In the face of this overwhelming evidence, to say that a jury would have found Rogers not guilty by reason of insanity, but for the two remarks in closing argument is simply ridiculous.

Based upon the introduction of the claimed error by the Respondent and the overwhelming evidence of guilt as well as sanity, the Ohio Supreme Court should have been satisfied that the error relied upon was harmless.

III. WAINWRIGHT v. GREENFIELD SHOULD NOT APPLY TO A FACT SITUATION WHEN DEFENSE COUNSEL ELICITS TESTIMONY THAT AN ACCUSED ASSERTED HIS MIRANDA RIGHTS AND FAILED TO OBJECT TO THE SUBSEQUENT USE OF THE INFORMATION DURING TRIAL.

This case was originally decided by the Ohio Supreme Court on June 5, 1985 (Appendix A32-A58). *State v. Rogers*, 17 Ohio St. 3d 174 (1985). This Court then remanded the case in light of *Caldwell v. Mississippi* (Appendix A30). The Ohio Supreme Court then expanded the scope of review to include the *Wainwright* issue. However, on December 30, 1986 the Ohio Supreme Court decided the *Caldwell* issue. *State v. Rogers*, 28 Ohio St. 3d 427 (1986) (Appendix A12-A29). However, at that time the Ohio Supreme Court decided that the Respondent had abandoned the *Wainwright* issue and the doctrine of res judicata foreclosed consideration on that issue. Justice Holmes writing for the majority said:

After examining the record in the present case, it becomes apparent that appellant does not stand in the asserted "identical posture" as the appellant in *Buell*. Although appellant did fail to object at the trial level, it appeared to be a conscious result of its own decision to initially broach the subjects now asserted to have been erroneously broached. However, the issue was firmly raised before the Court of Appeals for Lucas County in appellant's proposition of law number twenty-six. That court determined that any possible error was self-induced.

Proposition of Law Number Twenty-Six (Appendix A112) in the State Court of Appeals questioned the ad-

missibility of the evidence in question and not the use of the evidence. The entire issue was abandoned to the Ohio Supreme Court and the subsequent Writ of Certiorari to this Court. It was only upon remand that the Respondent raised this issue for the first time. The Ohio Supreme Court violated its own rule set forth in *State v. Williams*, 6 Ohio St. 3d 281 (1983) which said that the scope of review should be limited upon remand from the United States Supreme Court to the specific issue of the remand.

It was procedurally at this stage that the Respondent first questioned the use of this evidence at trial. It is well settled in Ohio as set forth in *State v. Black*, 54 Ohio St. 2d 304 (1978) that:

"It is an accepted rule of law in Ohio that an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Barker*, 53 Ohio St. 2d 135, (1978); *State v. Gordon*, 28 Ohio St. 2d 45, 57 (1971)."

Thus, it appears that this issue was waived at trial and abandoned upon appeal.

Further, a major distinction should be made between the case at bar and *Greenfield*. In both *Greenfield* and *Doyle v. Ohio*, 426 U.S. 610 (1976) it was the use of defendant's post-arrest silence which triggered the due process violation. In the case at bar the issue is not silence but Rogers' request for a lawyer. In *Sullie v. Duckworth*, 689 F.2d 128 (7th Cir. 1982) the United States Court of Appeals noted the distinction between the two rights in holding that an accused's request for counsel was admissible

in support of the state's contention that he was legally sane at the time of the offense—(especially since the request came “only 30 hours after the crime”.) 689 F.2d at 131. In the case at bar, Rogers' request for counsel came approximately 8 hours after the offense.

Often in prosecutorial argument cases, courts have refused to reverse a conviction because the comments were “an invited response” due to defense counsel's argument. *Lawn v. United States*, 355 U.S. 339 (1958); *United States v. Young*, 105 S. Ct. 1038 (1985). The evidence itself (which might otherwise be inadmissible) may be allowed when defense counsel's questioning opens the door. *Walder v. United States*, 347 U.S. 62 (1953). Even evidence and arguments regarding post-arrest silence when it is offered to rebut a defense claim that police failed to fully investigate and get the accused's side of the story before chasing him. *State v. Bell*, 446 So. 2d 1191 (La. 1984).

One additional argument which was not presented in *Wainwright* deals with the defense of insanity. In Ohio, the defendant has the burden of proving insanity by a preponderance of the evidence. This was recently approved and acknowledged in *Martin v. Ohio*, 480 U.S. (1987).

Historically even if not recognized legally, the Defendant may present this defense through experts who base their opinions to a large degree upon statements of the accused. This in any other respect is blatant hearsay. However, it appears to be recognized.

When this defense is raised, what the Defendant has said or his actions in close proximity to the crime is important to the experts. The failure to disclose this information to the experts should be admissible for im-

peachment but in this case the evidence was previously admitted. Therefore, the use of the assertion of the right to counsel is an affirmative act to be utilized by experts in the affirmative defense as raised by the Defendant. This distinction must be addressed in a full discussion of the *Wainwright* holding.

Wherefore, the State of Ohio believes that significant differences exist between the present case and the *Wainwright* decision. Therefore, based upon these distinctions, the Ohio Supreme Court improperly applied *Wainwright*.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the sentence of death reinstated.

Respectfully submitted,

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TO THE SUPREME COURT OF OHIO

**APPENDIX TO PETITION
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Opinion of the Court of Common Pleas of Lucas County, Ohio, October 29, 1982	A125

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 12, 1987)

No. 87-784

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,
vs.

BILLY ROGERS, AKA RAYMOND LEE HUDSON,
Appellant.

[32 Ohio St. 3d 70]

*Criminal law—Aggravated murder—Prosecutor's use of
defendant's post-Miranda exercise of rights as proof
of defendant's sanity—Prejudicial error.*

APPEAL from the Court of Appeals for Lucas County.

ON MOTION SUA SPONTE FOR RECONSIDERATION.

Appellant was convicted of the aggravated murder of seven-year-old Lisa Bates and sentenced to death. In *State v. Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E.2d 984, the Ohio Supreme Court affirmed both the trial verdict and sentence. The case was again considered pursuant to remand from the United States Supreme Court (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E.2d 52, wherein we reaffirmed our prior determinations. Thereafter, a motion was filed by defense counsel

to reconsider the case because of the United States Supreme Court's decision in *Wainwright v. Greenfield* (1986), 474 U.S., 88 L. Ed. 2d 623. This court initially overruled such motion but subsequently reconsidered the matter.

This cause is now before the court pursuant to reconsideration in light of *Wainwright v. Greenfield*.

Anthony G. Pizza, prosecuting attorney, James D. Bates and James E. Yavorcik, for appellee.

John J. Caliahan, Ralph DeNune III and Douglas A. Wilkins, for appellant.

Randall M. Dana, David C. Stebbins and Randall L. Porter, for *amicus curiae*, Ohio Public Defender Commission.

Per Curiam. On January 14, 1986, the United States Supreme Court decided the case of *Wainwright v. Greenfield* (1986), 474 U.S., 88 L. Ed. 2d 623. Respondent in that case had, at the trial level, entered a plea of not guilty by reason of insanity. During the closing argument, the prosecutor argued, in pertinent part:

"[A]nd the officer reads him his *Miranda* rights. Does he say he doesn't understand them? Does he say 'what's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what is going on * * * and knows the consequences of his act. * * * [A]ccording to Detective Jolley,—he's down there. He says, 'have you been read your *Miranda* rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do you want to talk to an attorney.' 'Yes.' And after he talked to the

attorney again he will not speak. * * * So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity." *Id.* at 627-628.

Basing its decision upon *Doyle v. Ohio* (1976), 426 U.S. 610, the court stated: "In *Doyle*, we held that *Miranda* warnings contain an implied promise, rooted in the Constitution, that 'silence would carry no penalty.' 426 U.S. at 618, 49 L. Ed. 2d 91, 96 S. Ct. 2240."¹ It was the court's view that the government may not first induce silence by implicitly assuring " "that his silence will not be used against him." " *id.* at 630, quoting *Fletcher v. Weir* (1982), 455 U.S. 603, 606, " 'then using his silence to impeach an explanation subsequently offered at trial.' " *Greenfield, supra*, at 630, quoting *South Dakota v. Neville* (1983), 459 U.S. 553, 565. The court stated further that: "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized."² *Id.* at 632.

In the case before us, appellant was advised of his *Miranda* rights pursuant to arrest and interrogation. He

1. "Our conclusion that it was fundamentally unfair for the Ohio prosecutor to breach that promise by using the defendants' postarrest, post-*Miranda* warnings silence to impeach their trial testimony requires us also to conclude that it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to respondent by using his postarrest, post-*Miranda* warnings silence as evidence of his sanity." (Footnote omitted.) *Wainwright v. Greenfield, supra*, at 632.

2. With this point, Justice Rehnquist and the Chief Justice have voiced disagreement in the concurring opinion. They would limit *Doyle's* impact to the exercise of the right to silence. See *Wainwright v. Greenfield, supra*, at 633-635 (Rehnquist, J., concurring.) Nevertheless, the majority has determined to extend *Doyle* beyond the exercise of the right to silence.

asserted his right to remain silent and his right to speak with an attorney. Later, he asserted his innocence by reason of insanity at the time of the commission of the crime.

We have thoroughly reviewed and reanalyzed the record in the case *sub judice* in light of *Greenfield*. The prosecution's repeated use of appellant's post-*Miranda* exercise of his rights as proof of his sanity permeated the trial. Under *Doyle* as interpreted by the United States Supreme Court in *Greenfield*, we are forced to the conclusion that error occurred, and for the reasons which follow, we must now reverse appellant's conviction in accordance with the mandates of *Greenfield*.

In reviewing the trial transcript, we note that the prosecution asked Officer McClellan whether he read the *Miranda* warnings to appellant and whether appellant, in the officer's opinion, understood his rights. Appellant's counsel then sought to elicit testimony on cross-examination that appellant was "apathetic throughout the entire procedure." On cross-examination of Officer Marx, appellant's counsel inquired expressly as to appellant's reaction concerning each particular right, including his exercise of his right to an attorney and, impliedly, his right to keep silent. While it seems clear that counsel hoped to discover evidence that appellant's responses were less than intelligent or cogent, the very opposite being, in fact, demonstrated, it is nevertheless certain that appellant's counsel first broached the issue of whether appellant's conduct and exercise of his *Miranda* rights were evidence of insanity.

The prosecution immediately responded on redirect with an exhaustive inquiry into appellant's responses when informed of his *Miranda* rights, including appel-

lant's statement that he wanted "to talk to a lawyer first." After describing appellant's actions of going over to the telephone, looking up the telephone number of an attorney, calling the number, and conversing with the attorney, the officer testified that appellant "advised me that he had contacted his attorney, Mr. Gottlieb, and that his attorney advised him not to sign any papers, not to make any statements to the police * * *." After a recross-examination by appellant's counsel wherein it was pointed out that appellant merely exercised his constitutional rights, the prosecution inquired as follows:

"Q. With regard to that line of questioning, you stated it's not wrong for a person to assert their [sic] Constitutional rights. Do you consider those the actions of an insane man, Detective Marx?

"A. No, I would not."

During appellant's case-in-chief, counsel presented several experts attesting to appellant's insanity. On cross-examination of Dr. Leopold, the prosecution utilized the fact that appellant responded rationally to the reading of his *Miranda* rights and acted intelligently in exercising his right to contact an attorney of his choice, to force the psychiatrist to conclude as follows:

"A. * * * And from what you described, the phone call, the lawyer, the attempt of hiding the body, he apparently knew right from wrong. Could he conform [his conduct to that standard]? I guess at the moment he could have. So it changes my opinion, yes."

The psychiatrist also agreed, in a complete change of opinion, that appellant knew the difference between

right and wrong "at the time of the offense" and had the ability "to have refrained from doing the act."

On redirect of the state's rebuttal expert, Dr. Sherman, the prosecution questioned as follows:

"Q. Now, Doctor, * * * were you aware that Mr. Rogers had exercised his right to remain silent and talk with an attorney?

"A. No, I was not aware of that.

"Q. If you were aware of that fact, Doctor, that some two hours after his arrest, upon being given his rights by the detective, he had indicated that he wanted to discuss the matter with an attorney, approximately 2:00 a.m. in the morning remembered the name, location, the phone number and had a discussion with an attorney, would that help you at all in your evaluation of Mr. Rogers?

"A. Most certainly it would.

"Q. And what assistance would that give you in your evaluation?

"A. It would assist me in at least two areas: the first regards refuting diagnosis, say, of an organic brain syndrome, like an alcohol amnesic syndrome. * * * He had the presence of mind to look up a particular attorney's name, which, incidentally, brings up the second issue, which is his ability to attend to a topic at hand. Individuals who have got organic brain syndromes have very short attention spans. * * * It also suggests to me that this individual had some knowledge that he was in some sort of trouble.

"Q. Now, Doctor, assuming those facts to be true for the purpose of this question, would those facts or factors assist you in your examination of Mr. Rogers in forming your opinion to a reasonable medical certainty as to the sanity of Mr. Rogers at the time in question?

"A. It would have corroborated my current opinions."

In closing arguments, the prosecution made repeated references to appellant's exercise of his *Miranda* rights. Mr. Yavorcik stated:

"You also heard Detective Marx testify, summarize his investigation. He also told you about Billy's efforts to obtain an attorney. Looked through a phone book at two in the morning to find his attorney, same attorney who had represented him before, 1980 case. Make the call, come back and tell Detective Marx, 'No more questions.'"

Later, he commented:

"Doctor Leopold in fact impeached the psychologist called by the defense, Christopher Layne. When confronted with the fact that the defendant had the presence of mind to look up his attorney's name, what was his opinion? Could the Defendant conform his actions to the requirement of law? 'I guess at that time he could,' that's what Doctor Leopold said."

The state's co-counsel, Mr. Bates, also referred to appellant's exercise of his right to silence. In commenting on Dr. Leopold's testimony, he stated:

"When he's given the facts just the way that you have been given these facts—and almost all of

the facts in this case are uncontroverted—he changes his opinion. ‘If those are the facts, the necktie, the time, the exercising of the rights affidavit, in my opinion he was sane.’”

Later, he added:

“And what does he do when he gets to the Detective Bureau? He doesn’t say I don’t remember. He doesn’t say anything about the offense. He says, I understand my third right. I am going to call Mr. Gottlieb who[m] he remembers from a prior case, and then tells Detective Marx I don’t want to talk with him. Now, are those the actions of an insane person or are those the actions of a person who is acting responsibly, knowing what his rights are and exercising those rights?”

It is apparent that the trial court and parties for both sides perceived no error in the evidentiary use of appellant’s post-*Miranda* exercise of his rights, but viewed appellant’s actions as probative evidence on the issue of insanity. There was no objection by defense counsel, who, several times, entered into the exact same subject matter during questioning. The trial court did not curtail such incursions and gave no limiting instruction.

Because the error was not objected to, it generally could be considered as being waived. Accordingly, we must consider the above colloquies under the plain or harmless error analysis. *Wainwright v. Greenfield*, *supra*, at 635-636 (Rehnquist, J., concurring); see, also, *State v. Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E.2d 1323; *State v. Rahman* (1986), 23 Ohio St. 3d 146, 157, 23 OBR 315, 324, 492 N.E.2d 401, 411 (Holmes, J., dis-

sentencing); *State v. Zuern* (1987), 32 Ohio St. 3d 56, N.E.2d See, also, *Chapman v. United States* (C.A.5, 1976), 547 F.2d 1240, 1248, certiorari denied (1977), 431 U.S. 908; *Martin v. Foltz* (C.A.6, 1985), 773 F.2d 711, 715; *United States v. Disbrow* (C.A.8, 1985), 768 F.2d 976, 980; *United States v. Ortiz* (C.A.9, 1985), 776 F.2d 864, 865; *United States v. Remigio* (C.A.10, 1985), 767 F.2d 730, 735; *United States v. Ruz-Salazar* (C.A.11, 1985), 764 F.2d 1433, 1437. We note that federal courts, in applying the plain or harmless error analysis in cases where there had been *Doyle* violations, with near unanimity, have held such to be violative of due process and therefore prejudicial, requiring a reversal. See, e.g., *United States v. Elkins* (C.A.1, 1985), 774 F.2d 530, 539; *Hawkins v. LeFevre* (C.A.2, 1985), 758 F.2d 866, 877; *United States v. Cumiskey* (C.A.3, 1984), 728 F.2d 200, 204, affirmed after remand (1984), 745 F.2d 278, certiorari denied (1985), 471 U.S. 1005; *Williams v. Zahradnick* (C.A.4, 1980), 632 F.2d 353, 360.

Obviously, the evidence from appellant's post-*Miranda* exercise of his rights was not used to impeach his in-court testimony, since he never took the witness stand. However, it was used to attack appellant's insanity defense throughout the trial, and thus went to the heart of appellant's defense. Also, the reliance was repeatedly and expressly upon appellant's exercise of both his right to silence as well as his right to an attorney. Not only was such exercise of rights utilized in closing argument, but in the prosecution's case-in-chief, as well as to overturn appellant's expert witness' opinion. Beyond any serious doubt, therefore, the rule set forth in *Greenfield* was violated at crucial stages of the trial and appellant's

exercise of his right to keep silent was utilized as substantive evidence against him.

While pointing out that certain portions of the testimony concerning the appellant obtaining legal counsel are certainly probative evidence of appellant's sanity when he committed the acts in question, we must nevertheless abide by the principle of law mandated upon us by the United States Supreme Court that an exercise of rights under the Constitution cannot be used as evidence against appellant where such exercise was in response to the *Miranda* rights being read to him. In the new trial, which we now must regrettably order, police may of course testify concerning their impressions of appellant's answers to their questions, his degree of comprehension and any conduct which they observed. *Wainwright v. Greenfield*, *supra*, at 628, 632, and 634, footnote (Rehnquist, J., concurring). References to appellant's right to silence, his right to an attorney, or the exercise thereof, should not be made. But, cf., *Fletcher v. Weir*, *supra*.

We, therefore, reverse the determinations of the courts below in accordance with the United States Supreme Court's opinion in *Wainwright v. Greenfield*, and remand for a new trial.

*Judgment reversed
and cause remanded.*

MOYER, C.J., SWEENEY, LOCHER, HOLMES, REILLY, WRIGHT and H. BROWN, JJ., concur.

REILLY, J., of the Tenth Appellate District, sitting for DOUGLAS, J.

**ORDER ON MOTION SUA SPONTE
FOR RECONSIDERATION**

(Dated March 20, 1987)

Case No. 84-784

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,

v.

BILLY ROGERS, a/k/a RAYMOND LEE HUDSON,
Appellant.

REHEARING ENTRY

(Lucas County)

The Ohio Public Defender, having filed an amicus curiae motion for reconsideration of our previous order,

And upon motion of Justice Robert E. Holmes,

IT IS ORDERED by the Court, *sua sponte*, that a motion for reconsideration be, and the same is, hereby granted in order that the Court may give proper consideration to the effect that *Wainwright v. Greenifeld* (1986), 474 U.S., 88 L. Ed. 2d 623 may have upon this case.

IT IS FURTHER ORDERED by the Court that no additional briefs may be filed except for the filing of additional authorities, if any, as they relate to *Wainwright*, *supra*, pursuant to Section 4, Rule V of the Supreme Court Rules of Practice.

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 30, 1986)

No. 84-784

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,
vs.

BILLY ROGERS, AKA RAYMOND LEE HUDSON,
Appellant.

[28 Ohio St. 3d 427]

Criminal law—Aggravated murder—Death penalty upheld on remand, when—Statements made to jury during mitigation phase were accurate and not made to induce reliance on appellate process.

O.Jur 3d Criminal Law §§ 1841, 1845.

1. *Caldwell v. Mississippi* (1985), 472 U.S. 320, is inapplicable where the statements made to the jury during the mitigation phase of a capital trial were accurate statements of the law and were not made to induce reliance on the appellate process.
2. If defense counsel improperly characterizes the role of the jurors during the mitigation phase, then the prosecution may make a brief, corrective statement.

ON REMAND from the Supreme Court of the United States.

Appellant was convicted of the strangulation murder of seven-year-old Lisa Bates, whose body was discovered in appellant's closet. See *State v. Rogers* (1985), 17 Ohio

St. 3d 174. The jury found the existence of two statutory aggravating circumstances, i.e., that the offense was committed in the course of a kidnapping and in the course of a rape. R.C. 2929.04(A)(7).

Thereafter, the penalty phase of the trial was conducted as required by R.C. 2929.03. The jury returned a finding that the aggravating circumstances outweighed the mitigating factors and accordingly recommended the death penalty. On October 29, 1982, the trial court filed its written opinion which confirmed that the aggravating circumstances outweighed the mitigating factors, beyond any reasonable doubt. The trial court then imposed the sentence of death. Both the court of appeals and the Ohio Supreme Court affirmed the verdict and the sentence. Each court independently determined that the aggravating factors outweighed the factors in mitigation. *State v. Rogers, supra*.

Subsequently, the United States Supreme Court decided the case of *Caldwell v. Mississippi* (1985), 472 U.S. 320. On December 2, 1985, the United States Supreme Court vacated this court's judgment in *State v. Rogers, supra*, and remanded the case for further consideration in light of *Caldwell v. Mississippi, supra*. (*Rogers v. Ohio* [1985], U.S., 88 L. Ed. 2d 452.)

Anthony G. Pizza, prosecuting attorney, James D. Bates and James E. Yavorcik, for appellee.

John J. Callahan, Ralph DeNune III and Douglas A. Wilkins, for appellant.

Randall M. Dana, David C. Stebbins and Randall L. Porter for *amicus curia*, Ohio Public Defender Commission.

HOLMES, J. In *Caldwell v. Mississippi, supra*, the United States Supreme Court held that a death sentence is invalid "when the sentencing jury is led to believe that

that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell, supra*, at 323. It is clear that the Mississippi jury was statutorily obligated to determine whether a defendant "should be sentenced to death," or to life imprisonment. Miss. Code Annot. Section 99-19-101.

In response to the defense counsel's assertions, the prosecution in *Caldwell* stated during closing argument:

"* * * I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. * * * [T]he decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.'" *Id.* at 325-326.

Upon appeal, the Mississippi Supreme Court narrowly upheld the above closing argument.

In reversing, the United States Supreme Court noted that the prosecutor's remarks provided the jurors with "an invitation to rely on * * * [appellate] review" which would "generate a bias toward returning a death sentence," and which "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Caldwell, supra*, at 231. Also, the court found the statutory framework of appellate review insufficient to correct the complained-of error. The court noted that: "Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision

and that review is with a presumption of correctness.'” *Id.* at 331, quoting *Caldwell v. State* (Miss. 1983,) 443 So. 2d 806, at 816 (Lee, J., dissenting), and citing Miss. Code Annot. Section 99-19-105 (Supp. 1984). Consequently, the prosecution’s argument undermined the Eighth Amendment guarantee of a reliable determination of the appropriateness of death as punishment in particular cases. *Id.* at 323, citing *Woodson v. North Carolina* (1976), 428 U.S. 280.

Upon review of Ohio’s statutory framework and the circumstances of this case, it must be concluded that none of the above dangers expressed in *Caldwell* threatened the integrity of the sentencing authority of the case *sub judice*.

At the outset of the within analysis, it should be stated that Ohio’s statutory framework for the imposition of the death penalty is altogether different from that of Mississippi, most importantly in that Ohio has no “sentencing jury.” All power to impose the punishment of death resides in the trial court which oversees the mitigation or penalty phase of the trial. The duty of the trial judge is set forth in R.C. 2929.03(D)(3).¹

1. R.C. 2929.03(D)(3) states as follows:

“Upon consideration of the relevant evidence at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury’s recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

“(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

“(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.”

Immediately obvious is that, under this provision, the jury provides only a *recommendation* as to the imposition of the death penalty. The trial court must thereafter independently re-weigh the aggravating circumstances against the mitigating factors and issue a formal opinion stating its specific findings, before it may impose the death penalty. R.C. 2929.03(F). It is the trial court, not the jury, which performs the function of sentencing authority. Thus, no "sentencing jury" was involved in the proceedings below. Furthermore, as actual sentencer, the trial court was "present to hear the evidence and arguments and see the witnesses" and was in a position to fully appreciate a plea for mercy. *Caldwell, supra*, at 331.

Furthermore, Ohio's sentencing procedures are not unique both because a separate sentencing hearing is utilized, and because capital sentencing authority is invested in the trial judge. See, e.g., Ala. Code Subsection 13A-5-47 (1986 Supp.) (judge is not bound by jury's advisory verdict); Ariz. Rev. Stat. Annot. Section 13-703(B), (C) and (D) (1986 Supp.) (jury is completely excluded from sentencing); Colo. Rev. Stat. Section 16-11-103(2) (C) (1985 Supp.) (trial judge may vacate a jury finding if clearly erroneous); Fla. Stat. Section 921.141(2) (1982 Cum. Supp.) (trial court independently re-weighs aggravating versus mitigating circumstances after an advisory jury verdict); Idaho Code Section 19-2515(d) (1986 Supp.) (trial court alone sentences and conducts a mitigation hearing), etc.

Florida's statutory system, which is remarkably similar to Ohio's was expressly upheld in the case of *Spaziano v. Florida* (1984), 468 U.S. 447. Justice Blackmun, writing for the court, concluded:

"If a judge may be vested with sole responsibility for imposing the [death] penalty, then there is nothing

constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury." *Id.* at 465.

Recently, the United States Court of Appeals for the Eleventh Circuit issued its decision in *Adams v. Wainwright* (C.A. 11, 1986), 804 F.2d 1526. That panel reversed a Florida death sentence because it felt that the trial court's instructions violated the spirit of the *Caldwell* decision. We need not consider the broad reading of *Caldwell* set forth therein since the case before us differs in several significant respects. Neither the trial court in the present case nor the prosecutor invited the jury to rely upon later judgments. Instead, merely correct legal statements were made. Furthermore, under Ohio's framework, the trial court is not a simple "buffer where the jury allows emotion to override the duty of a deliberate determination," *Cooper v. State* (Fla. 1976), 336 So. 2d 1133, 1140, certiorari denied (1977), 431 U.S. 925, but is the authority in whom resides the sole power to initially impose the death penalty. Finally, to hold that "the jury's sense of responsibility for its advisory sentence was diminished," *Adams, supra*, at 5, for the single reason that the trial court informed the jury that their verdict was a mere recommendation, creates an unacceptable dilemma. Either the relevant portions of Ohio's statutory framework for imposition of the death penalty must be ruled unconstitutional or any juror who at any time has learned the legal nature of the jury's finding must be considered hopelessly prejudiced. This court cannot accept either proposition based on *Caldwell*.

Thus, the Sixth Amendment provides no right to a jury determination of the punishment to be imposed; nor

does the Ohio system impugn the Eighth Amendment. *Spaziano, supra*, at 464. See, also, *State v. Buell* (1986), 22 Ohio St. 3d 124, 142-144, and *State v. Williams* (1986), 23 Ohio St. 3d 16, 21-22.

Consequently, the trial court's instructions as well as the jury verdict forms,² based as they were upon the very wording of a constitutional statutory sentencing procedure,

2. Appellant contends that the record in the present case reveals that the conduct of the prosecution and the trial court throughout the penalty phase of the trial was of such character as to deprive appellant of a fair trial under authority of *Caldwell v. Mississippi, supra*. The specific conduct complained of began with the *voir dire* of prospective jurors at which time the possible penalty phase finding was referred to as a mere *recommendation* to the trial judge. Apparently, both the prosecution and the defense utilized "recommendation"-based questions in determining the views of potential jurors.

Also, in its final instructions, the trial court stated:

"If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Billy Rogers was found guilty of committing outweigh the mitigating factors, then you must return such finding to the court. I instruct you as a matter of law that if you make such a finding then you have no choice and must *recommend* to the court that the sentence of death be imposed upon the defendant, Billy Rogers.

"A jury *recommendation* to the court that the death penalty be imposed is just that, a *recommendation*, and is not binding upon the court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this court. In the final analysis, after following the procedures and applying the criteria set forth in the statute, I will make the decision as to whether the defendant, Billy Rogers, will be sentenced to death or to life imprisonment." (Emphasis added.)

Finally, the verdict forms given to the jury recited in part as follows:

"We, the jury *recommend* that the Sentence of Death be imposed on the defendant, BILLY ROGERS."

"We, the jury *recommend* that the defendant, BILLY ROGERS, be sentenced to Life Imprisonment with parole eligibility after serving [twenty or thirty] full years of imprisonment." (Emphasis added.)

merely gave "the jury accurate information of which both the defendant and his counsel * * * [were] aware." *California v. Ramos* (1983), 463 U.S. 992, 1004.

Also, the record before us differs from that of *Caldwell* in that neither the prosecution nor the trial court made mention of the appellate process or thereby sought to allow the jurors to minimize their role through dependence upon such process. Nevertheless, another important distinction from *Caldwell* is that the Ohio appellate courts are statutorily obligated to do much more than "merely review the jury's decision * * * with a presumption of correctness." R.C. 2929.05³ provides that the intermediate courts of appeals and the Supreme Court of Ohio must each weigh the mitigating factors against the aggravating circumstances; evaluate whether the sentence of death is

3. R.C. 2929.05(A) states in pertinent part:

"* * * The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

appropriate, excessive, or disproportionate; and review again the aggravating circumstances and whether the trial court properly weighed them against the mitigating factors.

Such thorough review provides every opportunity and authority for a reviewing court to make an original determination, to independently weigh not only those factors weighed by the jury but also to determine whether the sentence was appropriate. This grant of wide latitude requires Ohio's appellate courts to function as much more than mere reviewers of jury findings. See, also, *State v. Glenn* (1986), 28 Ohio St. 3d 451, 462-463. Indeed, Ohio requires that appellate courts must perform a proportionality analysis, which goes beyond constitutional requirements. *Pulley v. Harris* (1984), 465 U.S. 37. It therefore becomes clear that Ohio's statutory, multisteped sentencing process does not deprive the capital offender of a sensitive sentencer and then place him at the mercy of the normal appellate review system.

Turning now to the prosecutor's rebuttal comments,⁴ it is observed that these, too, were mere accurate statements of the law. Further, his few observations on the nature of the jury's finding fall far short of the kind of provocations to error found in *Caldwell, supra*. The prosecution in the present case neither invited erroneous

4. During final arguments in the penalty phase, appellant's counsel made several arguments concerning the death penalty and the jury's role for that part of the proceedings. During rebuttal, the prosecution commented as follows:

"Mr. Callahan put some even greater obligations on you. He doesn't say to you that it's your *recommendation* to the Court. He says that you, ladies and gentlemen, decide *whether to kill Billy Rogers*.

"You ladies and gentlemen, as we discussed with you in the voir dire, decide a *recommendation* to the Court. The Court must agree or disagree with your finding." (Emphasis added.)

reliance on an appellate overview, nor provided false assurances that the jury may more "freely 'err because the error may be corrected on appeal.' * * * " *Caldwell, supra*, at 331, quoting *Maggio v. Williams* (1983), 464 U.S. 46, 54-55 (Stevens, J., concurring). The prosecutor made no reference to any appellate court or to the Supreme Court of Ohio. No comment was made about automatic appellate review of death sentences. Consequently, the prosecution did not create a "chance that an invitation to rely on that review will generate a bias toward returning a death sentence." *Caldwell, supra*, at 333. As he concluded his argument, the prosecution analyzed the balancing process required of the jurors.⁵ Again, his use of the term "recommend" was incidental to and merely part of the recitation of his views on the statutory requirements. He could hardly be expected to falsely inform the jurors of what act they must do should their findings be of a particular kind. This he would have risked had he used a different word to describe their actions.

This court has never held that prosecutors are "free to expose capital sentencing juries to any information and argument concerning postsentencing procedures." *Caldwell, supra*, at 335. Although the Ohio jury is not a "capital sentencing" jury because it cannot impose the death penalty, nevertheless this court has demonstrated an appreciation of the fact that some degree of unreli-

5. He stated:

"If you don't [find a mitigating factor], your *recommendation* to the Court must be the death penalty. If you do [find a mitigating factor], you have to weigh this, and if the aggravating factors, that being the intentional killing in the commission of the rape and the commission of the kidnapping, if that outweighs, then you must *recommend* the death penalty." (Emphasis added.)

ability in jury findings may be occasioned by arguments based on postsentencing procedures. We have repeatedly stated that "because of the possible risk of diminishing jury responsibility, * * * we prefer that in the future no reference be made to the jury regarding the finality of their decision * * *." *State v. Williams, supra*, at 22, quoting *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 202-203, certiorari denied (1985), 473 U.S., 87 L. Ed. 2d 643. In so stating, we reserved power to evaluate such references in the context of the record to determine the impact of such statements and whether defense counsel, by its statements, created a reasonable basis for a response from the prosecution.

In the case here, the prosecution's single argumentative reference to the jury's "recommendation" was made expressly in response to defense counsel's remarks. In his comments on the death penalty, defense counsel stated that: "[A]lmost nothing [is written] to indicate the death penalty is a deterrent. * * * In the 30 years that I have been representing people in murder cases, rarely has the * * * man or woman expressed any thought of what the penalty might be, at the time of the crime."

After asserting that appellant did not act like a normal human being, counsel stated: "Do we kill a man like this? Because that's what you're being asked to do." Counsel later challenged the jury with the following: "* * * [W]e knew it would come to this point ultimately, are you going to kill Billy Rogers today or are you going to place him in an institution for the rest of his life?" Appellant also described the jury's duty under the statute: "The mitigating circumstances—or the aggravating circumstances, rather, in order for you to impose the death-penalty must outweigh the mitigating circumstances.

Even if they are equal, * * * you cannot impose the death penalty." As part of his conclusion, counsel quoted: "Though the justice of God may indeed ordain that some should die, the justice of man is all together [sic] and always insufficient for saying who these may be."

In a strongly worded argument, defense counsel confronted the jurors with the following statements:

"Is it justice, is it even seeking after justice to try to put Billy Rogers out of his miserable life some months hence? I submit to you, ladies and gentlemen, that life is something that this courtroom should not have anything to do with. Life is God-given. It doesn't come from the state of Ohio. It should not be a punishment to take a man's life away from him. It goes back to barbarism. I hope that some day we will consider death penalty trials as barbarous as we consider the burning of Joan of Arc at the stake. And with the evolving decency, the evolving humanity of people like yourself, perhaps that day will come soon."

To assert that the jurors are going to *kill* the appellant is not only an inaccurate statement of the law of Ohio, it is a brash, if not inappropriate, argument as utilized by appellant's counsel. Defense counsel certainly has the right to plead for mercy and, indeed, has the very duty to cause the jury to "confront both the gravity and the responsibility of calling for another's death." *Caldwell, supra*, at 324. However, such does not create a license for counsel to cross over into the area where, as here, an attempt was made to create an improper sense of guilt in the jury, and to direct this guilt into a finding in appellant's favor.

Furthermore, portions of defense counsel's argument were not directed to the jurors' responsibility to feel the gravity of their decision, but were undisguised attacks on the merits of capital punishment itself. This issue has been legislatively determined and is not a subject for argument or comment.

While the prosecutor's commentary in *Caldwell* was an unacceptable response to defense counsel's arguments because it "distorted the jury's deliberation," *id.* at 336, it can be concluded that the prosecutor in the case *sub judice* was not unreasonable in his determination not to allow these inaccurate representations to remain unchallenged. It is because of the circumstances contained in the record before us that this court has refused to adopt a *per se* rule concerning comments directed at the jury's role in the mitigation phase of a capital case. Where, as here, the prosecutor's remarks were restrained in emphasis and contained a brief corrective comment on the jury's role, and only contained a basic recitation of the law, it cannot be said that error or distortion entered into the jurors' deliberations.

In an order dated April 2, 1986, this court granted appellant's motion to expand the scope of review. Appellant's motion set forth a need to "raise the question in the state court" of whether the prosecution's comments and questions about the acts of appellant after he was advised of his *Miranda* rights were in violation of *Wainwright v. Greenfield* (1986), 474 U.S., 88 L. Ed. 2d 623. Appellant cited *State v. Buell*, *supra*, as authority to "include consideration of a recently decided constitutional issue not argued by an appellant * * *. This case is in the identical posture with respect to the *Greenfield* issue that *Buell* was with respect to the *Caldwell* issue." Appellant's motion, page 7.

After examining the record in the present case, it becomes apparent that appellant does not stand in the asserted "identical posture" as the appellant in *Buell*. Although appellant did fail to object at the trial level, it appeared to be a conscious result of his own decision to initially broach the subjects now asserted to have been erroneously broached. However, the issue was firmly raised before the Court of Appeals for Lucas County in appellant's proposition of law number twenty-six. That court determined that any possible error was self-induced.

On direct appeal to this court, appellant abandoned this argument. By failing to challenge the ruling of the court of appeals on direct appeal to this court, appellant has acquiesced in the previous ruling. Accordingly, Ohio's doctrine of *res judicata* has foreclosed consideration of such issue at this time. *State v. Roberts* (1982), 1 Ohio St. 3d 36.

Having reconsidered the issues presented on remand from the Supreme Court of the United States, in light of *Caldwell v. Mississippi*, *supra*, we hereby reaffirm our previous decision in this case for the reasons stated hereinabove.

Judgment reaffirmed.

CELEBREZZE, C.J., SWEENEY and LOCHER, JJ., concur.

C. BROWN, REILLY and WRIGHT, JJ., dissent.

REILLY, J., of the Tenth Appellate District, sitting for DOUGLAS, J.

CELEBREZZE, C.J., concurring. I concur in the majority's determination that the holding in *Caldwell v. Mississippi* (1985), 472 U.S. 320, does not require reversal of appellant's death sentence. Our decision today is consistent with past pronouncements and is in harmony with the analysis

of this issue found in my opinion in *State v. Williams* (1986), 23 Ohio St. 3d 16, 29-31 (Celebrezze, C.J., concurring).

Additionally, I write briefly in regard to some of the seemingly sweeping assertions in the majority opinion concerning the propriety of remarks by appellant's counsel in closing argument of the penalty phase of this trial. Justice Sweeney correctly observes in his concurring opinion, *infra*, that this court need only have held that to the extent counsel misstated the applicable law, the remarks were improper. As the majority itself states, there should otherwise be no *per se* rule concerning comments to the jury by the prosecution or defense counsel in the penalty phase of a capital trial.⁶ Although the trial judge is usually in the best position to issue curative instructions, I agree that the prosecutor's remarks in the case *sub judice* were proper and restrained corrective statements in response to defense counsel's erroneous assertion that the jurors were going to kill appellant. However, as a *caveat*, it should be remembered that such responsive comments are risky because *improper* prosecutorial argument will not always be excused under the doctrine of invited response.⁷ *Cald-*

6. The majority's attempt to limit the scope of defense counsel's comments in future proceedings is contradictory to its own pronouncement against such *per se* rules.

7. For example, in *Caldwell*, *supra*, the prosecutor's erroneous and improper invited response resulted in vacation of the death sentence. The majority quoted with approval the opinion of the dissenting state supreme court justices below:

"Assuming without accepting the majority's position that the defense counsel's argument invited error, it did not invite this error. Asking the jury to show mercy does not invite comment on the system of appellate review. This is true whether the plea for mercy discusses Christian, Judean or Buddhist philosophies, quotes Shakespeare or refers to the heartache suffered by the accused's mother.'" *Caldwell*, *supra*, at 337.

well, *supra*, at 336-337; *United States v. Young* (1985), 470 U.S. 1, 11-14.

Finally, appellant also asked this court to determine whether he was deprived of a fair trial by the state's use of his post-*Miranda* silence as evidence of his sanity. The United States Supreme Court has recently addressed such a question in *Wainwright v. Greenfield* (1986), 474 U.S., 88 L. Ed. 2d 623. Thereafter, we granted a motion to expand the scope of review in this cause during rehearing to include consideration of appellant's contention that the state's conduct ran afoul of the *Greenfield* decision. In my view, it may have been wiser for the majority to have reached the merits. Hopefully appellant will move for rehearing before this court so that the merits of this question can be resolved. If left unresolved in this state's courts, appellant's recourse, *inter alia*, is to again petition the United States Supreme Court for a writ of certiorari.

SWEENEY, J., concurring. I concur separately to emphasize that today's decision should not be interpreted as limiting, as a matter of law, the scope of defense counsel's argument. While it is necessary for the majority opinion to address the content of defense counsel's argument, because it was the basis for permitting the prosecution to "make a brief, corrective statement," I do not believe it is necessary to label defense counsel's argument as "brash," "inappropriate," or "an attempt * * * to create an improper sense of guilt in the jury. * * *" The prosecution did not object to the argument in question, nor did the trial court, which is in the best position to determine whether an argument is prejudicial, attempt to restrain the defense counsel.

Further, I do not believe that the issue of capital punishment should never be a "subject for argument or com-

ment" by defense counsel, simply because the issue previously has been "legislatively determined." Arguments concerning the propriety or constitutionality of capital punishment cannot be limited by this court as a matter of law, and such arguments may be, at times, essential to the conduct of a vigorous defense.

Defense counsel's argument herein was misleading in that it misstated the jury's role in the penalty phase of the defendant's trial. As such, it formed the basis for the prosecution's "corrective statement," which "contained a basic recitation of the law." The prosecutor's argument thus was proper and, in reaching this conclusion, we need not determine at this level that defense counsel's previous argument was inappropriate or improper.

CELEBREZZE, C.J., concurs in the foregoing concurring opinion.

CLIFFORD F. BROWN, J., dissenting. Because I believe that *Caldwell v. Mississippi* (1985), 472 U.S. 320, requires that appellant's sentence of death be reversed and remanded for resentencing, I dissent.

As explained in Justice Wright's cogent dissenting opinion in *State v. Williams* (1986), 23 Ohio St. 3d 16, 32-35, "* * * [t]he *Caldwell* court appears to hold that an instruction that is misleading in the sense that it diminishes the jury's sense of responsibility constitutes reversible error. * * * State-induced suggestions that the sentencing jury may shift its sense of responsibility for the imposition of the death penalty create a risk of substantial unreliability as well as potential bias in favor of death sentences. * * *" *Id.* at 34.

An instruction substantially similar to the one at bar formed the basis for reversing the denial of a writ of

habeas corpus for a defendant who had received the death penalty in the recent case of *Adams v. Wainwright* (C.A. 11, 1986), 804 F. 2d 1526. There, the trial judge instructed the initial panel of prospective jurors that their role in determining whether the defendant received the death penalty was only advisory, and that the ultimate responsibility rested with him as the trial judge. In holding that these comments impermissibly diminished the jury's sense of responsibility in violation of *Caldwell*, the circuit court reiterated the concern of the *Caldwell* court that a bias in favor of the death penalty is thereby created such that a jury, unconvinced that the death penalty is appropriate, might nevertheless impose it as an expression of outrage at the defendant's crime, secure in the comforting belief that any error will eventually be corrected.

A jury, understandably intimidated by the responsibility of deciding whether a human being shall live or die, will clutch at any comment from an authoritative source tending to relieve them of their terrible burden, and as a result, may discharge their grave responsibility with less than complete conscientiousness. *Caldwell, supra*, at 323-333. Such an effect cannot be tolerated.

Accordingly, I dissent to the majority's reaffirmance of defendant's sentence of death. I would vacate defendant's death penalty and remand for resentencing.

REILLY and WRIGHT, JJ., concur in the foregoing dissenting opinion.

**REMAND ORDER FROM THE UNITED STATES
SUPREME COURT**

(Dated December 2, 1986)

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

December 2, 1985

Mr. James D. Bates
Assistant Prosecuting Atty.
Lucas County Courthouse
Toledo, OH 43624-1680

Re: Billy Rogers v. Ohio
No. 85-5503

Dear Mr. Bates:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Caldwell v. Mississippi*, 472 U.S. (1985).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

**ORDER ON REHEARING OF THE
SUPREME COURT OF OHIO**

(Dated July 31, 1985)

Case No. 84-784

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,

v.

BILLY ROGERS, a.k.a., RAYMOND LEE HUDSON,
Appellant.

REHEARING ENTRY

(Lucas County)

It is ordered by the Court that rehearing in this case be, and the same is hereby denied.

/s/ FRANK D. CELEBREZZE
Chief Justice

OPINION OF THE SUPREME COURT OF OHIO

(Decided June 5, 1985)

No. 87-784

THE SUPREME COURT OF OHIO
COLUMBUS

STATE OF OHIO,
Appellee,

vs.

BILLY HUDSON, AKA RAYMOND LEE HUDSON,

[17 Ohio St. 3d 174]

Criminal law—Aggravated murder—Death sentence upheld, when.

O.Jur 3d Criminal Law §§ 1804, 1845.

1. Ohio's death penalty sentencing procedure does not place a defendant in double jeopardy by allowing the reintroduction of evidence regarding aggravating circumstances at the penalty phase of the trial.
2. In a capital trial, upon a plea of not guilty by reason of insanity, the bifurcation of the insanity issue from that of the issue of guilt of the defendant rests solely within the discretion of the trial court.
3. The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the

performance of his duties as a juror in accordance with his instructions and oath. (*Wainwright v. Witt* [1985], U.S., 83 L. Ed. 2d 841, followed.)

4. A trial court in a capital case is not required to instruct the jury as to the defendant's lawful disposition were he to be found not guilty by reason of insanity.
5. The trial court is required to give a full and correct statement of the law so that the jury can apply the law to the facts in evidence before it. Such a requirement does not obligate the trial court to explain to the jury the difference between the insanity defense and the defendant's mental state as a mitigating factor at the penalty phase of the trial.
6. During the sentencing phase of a capital trial the state, having the burden of proving that aggravating circumstances outweigh the mitigating factors, has the right to open and close arguments to the jury.
7. The word "age" as used in R.C. 2929.02(A), 2929.023, 2929.03 and 2929.04 refers to a defendant's chronological age.

O.Jur 3d Criminal Law § 126.

8. Broadcasting is permitted in a courtroom if the court determines that it would not distract participants, impair the dignity of proceedings, or otherwise materially interfere with the achievement of a fair trial or hearing. (*State, ex rel. Grinnell Communications Corp., v. Love* [1980], 62 Ohio St. 2d 399 [16 O.O.3d 434], approved and followed.)

O.Jur 3d Criminal Law § 1844.5.

9. The proportionality review required of the court of appeals pursuant to R.C. 2929.05(A) need not include criminal cases outside its geographical jurisdiction.

APPEAL from the Court of Appeals for Lucas County.

On the evening of November 14, 1981, the mother of seven-year-old Lisa Bates reported her child missing to the Toledo Police. Lisa had been seen at approximately 1:00 that afternoon in front of the apartment of appellant, Billy Rogers, a.k.a Raymond L. Hudson, with three other children. The children were watching appellant perform magic tricks.- At approximately 3:30 that afternoon the other children were called home but Lisa remained with appellant. About fifteen minutes later neither appellant nor Lisa could be seen on the street; however, Lisa's bicycle remained in front of appellant's apartment.

That evening, in response to the missing person report, the police conducted an extensive search of the neighborhood around Lisa's and appellant's homes. Sometime after 11:55 p.m. police Sergeant Dennie M. Sehlmeier obtained appellant's consent to search his apartment. During that search Lisa's body was discovered on the closet floor of appellant's second-floor bedroom. Appellant was then arrested. Scientific examination of Lisa's body and clothing revealed that she had been sexually molested and had died from strangulation.

Appellant was indicted for two counts of aggravated murder, murder-kidnapping and murder-rape. Two specifications were coupled with each count and charged (1) that the murder was committed while committing or attempting to commit kidnapping, and (2) that the murder

was committed while committing or attempting to commit rape. Appellant was found competent to stand trial and pleaded not guilty and not guilty by reason of insanity.

The cause proceeded to trial and the jury returned a guilty verdict for murder-rape, and for both specifications of rape and kidnapping. At the conclusion of the sentencing phase of the trial, the jury recommended that appellant be sentenced to death. The trial court agreed with the jury's recommendation and ordered that appellant be executed.

The court of appeals affirmed appellant's conviction and sentence.

The cause is now before this court upon an appeal as of right.

Anthony G. Pizza, prosecuting attorney, James D. Bates and James E. Yavorcik, for appellee.

John J. Callahan, Ralph DeNune III and Douglas A. Wilkins, for appellant.

WILLIAM B. BROWN, J. In order to determine whether appellant's death sentence should be affirmed, this court is required to do three things. First, we must answer the specific issues raised by appellant regarding the proceedings below. Second, we must independently weigh the aggravating circumstances in this case against any factors which mitigate against imposition of the death penalty. Finally, we must independently consider whether appellant's sentence is disproportionate to the penalty imposed in similar cases.

I

Appellant first attacks the constitutionality of Ohio's framework for imposition of capital punishment by ad-

vancing arguments similar to those used by the appellants in the recently decided cases of *State v. Jenkins* (1984), 15 Ohio St. 3d 164, and *State v. Maurer* (1984), 15 Ohio St. 3d 239. Appellant argues (1) that a statutory aggravating circumstance in a capital case must encompass a fact independent of the facts of the principal offense in order to comply with the United States and Ohio Constitutions, (2) that Ohio's capital sentencing structure, which requires the prosecution to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, violates due process, (3) that Ohio's death penalty law fails to set forth adequate safeguards to prevent the imposition of capital punishment in an arbitrary manner, (4) that Ohio's death penalty statute allows arbitrary and capricious imposition of the death penalty because it does not articulate a method to weigh aggravating circumstances against mitigating factors, and (5) that the statutory sentencing scheme for imposition of the death penalty violates the federal and state Constitutions because it is not the least restrictive means of accomplishing the objectives of the administration of justice. This court addressed and rejected each of these arguments in *Jenkins*. We held in *Jenkins* that Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981, in the context of these arguments, violates neither the United States nor the Ohio Constitutions. They can not, therefore, be the basis for reversal in this case.

Appellant raises an additional constitutional question which was not addressed in either *Jenkins* or *Maurer*. Appellant claims that Ohio's death penalty sentencing procedure places a defendant in double jeopardy by allowing re-introduction of evidence regarding aggravating circumstances at the penalty phase of the trial. As noted by

the court of appeals in this case, the United States Supreme Court has previously upheld similar statutory schemes providing for bifurcated trials in capital cases. See *Proffitt v. Florida* (1976), 428 U.S. 242, and *Gregg v. Georgia* (1976), 428 U.S. 153. The two phases of a capital trial are just that, two segments of one trial. Appellant was not placed in jeopardy for a second time during the sentencing phase of his trial, but, rather, remained in jeopardy for a final disposition of his case. Accordingly, this argument must be rejected.

Appellant raises several issues citing trial court error which we addressed in *Jenkins*. Appellant argues that the trial court erred first by advising the jury at the penalty phase of the trial that its decision to recommend the death penalty was not binding, and, second, by instructing the jury to disregard sympathy in its consideration of the evidence. Appellant contends further that the trial court was required to instruct the jury at the penalty phase of the trial that a non-unanimous verdict was sufficient to impose a sentence of life imprisonment. We addressed these contentions in *Jenkins* and found them to be without merit. Accordingly, they will not be the basis for reversal in this case.

Appellant also contends that due process requires separate trials on the issues of insanity and guilt. There is no authority in Ohio for bifurcation of a trial upon a plea of insanity. Various federal courts have ruled on the issue and have found that due process does not require a separate trial on the issue of insanity, and that the states are free to determine whether such issues should be tried separately or together. *E.g.*, *Vardas v. Estelle* (C.A.5, 1983), 715 F. 2d 206, 212-213; *Murphy v. Florida* (C.A.5, 1974), 495 F. 2d 553, 557, affirmed (1975), 421 U.S. 794.

Federal courts have further held that the question of bifurcation rests solely within the discretion of the trial court and that appellant must show an abuse of discretion for reversal. *Higgins v. United States* (C.A.D.C. 1968), 401 F. 2d 396, 398. Adopting this standard we find that appellant has failed to show an abuse of discretion in this case. He has merely claimed that:

“* * * Prejudice certainly resulted in this proceeding when Rogers was forced to claim that he was not guilty and simultaneously to admit that he committed the offense but that there were circumstances exonerating him from responsibility for his conduct.”

To the contrary, we feel that the pleas of not guilty by reason of insanity and not guilty are not necessarily contradictory. Where the accused is so insane at the time of the act that he is unable to form the requisite guilty purpose, he can not be found guilty. Since it is not necessarily prejudicial to require appellant to present evidence for both pleas in a single trial, the trial court's failure to bifurcate was not an abuse of discretion. As a result, we find no error in the trial court's decision to try both issues in a single trial.

Appellant's next propositions concern the death qualification process used during jury selection. He first contends that he was denied his right to a fair trial by an impartial jury when the jury was death-qualified with general questions about the prospective jurors' opinions on the death penalty. He then argues that even if general questions are permitted, it was error for the trial court to allow questioning of prospective jurors regarding the imposition of the death penalty in this particular case.

In *Jenkins, supra*, we analyzed appellant's first contention under the rationale of *Witherspoon v. Illinois*

(1968), 391 U.S. 510 [46 O.O.2d 368]. We found at 179 that according to *Witherspoon*, veniremen could be excluded for cause if they “‘made [it] unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s *guilt*.’ (Emphasis *sic*.)” Since our decision in *Jenkins*, the United States Supreme Court has modified the *Witherspoon* standard in *Wainwright v. Witt* (1985), U.S., 83 L. Ed. 2d 841. The Supreme Court dispensed with the reference to “automatic” decision-making and the “unmistakable clarity” standards. The *Witt* court held that the proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. See *Adams v. Texas* (1980), 448 U.S. 38, 45. Accordingly, we reaffirm our decision in *Jenkins* in light of *Witt*, and hold that a jury may be death-qualified with general questions concerning the prospective jurors’ opinions on capital punishment.

In *Jenkins* we did not specifically address the issue of whether a question to prospective jurors phrased in terms of “this” case is improper. The *Jenkins* opinion did, however, set forth the manner in which the jurors in that case were questioned on *voir dire*. We found the following questions allowable:

“* * * [A]re you stating to me unequivocally that under those circumstances will you follow my instructions as Judge and that you cannot and will

not consider fairly the imposition of the sentence of death if appropriate, *in this case?*” (Emphasis added.) *Id.* at 185.

“* * * [A]re you stating to me unequivocally that under no circumstances will you follow my instructions as Judge, and that you cannot and will not consider fairly and [sic] imposition of the sentence of death, if appropriate, *in this case?*” (Emphasis added.) *Id.* at 183.

In the instant case the judge questioned each potential juror in similar fashion:

“* * * In the event that you are selected as a juror in this case, and in the event that a finding of guilt is made, one of the penalties you may be asked to consider is the death penalty. As you sit here now are there any circumstances that you can foresee that will preclude you from following the Court’s instructions and fairly considering the imposition of the death penalty *in this case?*” (Emphasis added.)

A negative response to that question would not indicate that the juror was predisposed to voting for the death penalty given the facts of *this* case. He had not yet been presented with any evidence regarding the facts of this case. Such a response would merely indicate that, in *this* case, the only case in which he is being considered as a juror, he would be able to follow the court’s instructions and fairly consider the death penalty as required by law. Appellant’s argument must, therefore, be rejected.

Appellant further contends the trial court denied him a fair trial by overruling his challenges of potential jurors

for cause. Appellant argues that three prospective jurors had preconceived biases toward either the death penalty or appellant's plea of not guilty by reason of insanity. Appellant claims the trial court denied him due process when it overruled his challenges for cause and forced him to use his peremptory challenges prematurely. To determine whether the jurors challenged by appellant for cause should properly have been excluded, we apply the previously mentioned *Witt* standard of whether the prospective juror's views would prevent or substantially impair the performance of his duties according to his instructions and oath. Additionally, *voir dire* may constitute reversible error only upon a showing of abuse of discretion by the trial court. Upon thorough review of the *voir dire* transcript, we find that the trial court's denials of appellant's challenges for cause are supported by the record, therefore, appellant's argument for reversal on this issue has no merit.¹

1. The first prospective juror, appellant challenged for cause, Charles L. Spitler, was questioned as follows after he indicated that he did believe in the death penalty:

"Mr. Spitler: When I answered that question, I don't know the case, I don't the circumstances, I don't know how it was done or anything like that, so how could I really judge the death penalty?"

"* * *

"The Court: In the event you are given all of these considerations under the proper instruction by the Court—

"Mr. Spitler: Uh-huh.

"The Court: —and in the event the evidence does indeed allow you to consider mitigating circumstances, the question is, will you, in consultation with other members of the jury and in your own mind, take into account all of the evidence that is presented, take into account all of the possible sentences that the evidence says you may take into account and that the law says that you may take into account, and once all of that is presented to you, only then

(Continued on following page)

Appellant next maintains that evidence of his conviction for both kidnapping and rape, submitted by the state during the penalty phase of the trial, constituted unnecessary duplication of aggravating circumstances.

Footnote continued—

make a decision that you, together with your fellow jurors, believe is appropriate under the circumstances that exist then at that time in the case? Will you do that?

"Mr. Spitler: Yes.

"The Court: All right. Is the challenge renewed?

"Mr. Callahan [counsel for defendant]: Reserved."

Spitler's responses to the court's questions indicate that he was not irrevocably committed to a verdict before trial and that his performance of his duties as a juror would not be substantially impaired by his views on the death penalty. He was not, therefore, subject to a challenge for cause.

The second prospective juror appellant challenged for cause, Arthur F. Meissner, was questioned as follows:

"Mr. Bates [assistant prosecutor]: Okay. Now, the purpose of this interrogation is to determine whether you have any preconceived, personal or religious beliefs that would preclude you from considering all of the alternative penalties involved in the case when we get to that stage. Is there anything that you can think of in your background that would preclude you from considering the death penalty or considering life imprisonment based on the facts that you hear during the course of the trial?

"Mr. Meissner: No.

"Mr. Bates: Okay. Nothing further.

"Mr. Meissner: As I stated before, yes, I believe in the death penalty, should it be proved that the Defendant is guilty beyond any shadow of a doubt. It's got to be embedded in my mind that the Defendant is either guilty or not guilty.

"Mr. Bates: All right. Okay. Nothing further.

"The Court: Based upon that expansion, I'd like to just simply clarify that you will be asked to consider, in the event of a finding of guilt—

"Mr. Meissner: Uh-huh.

"The Court: And it isn't beyond a shadow of a doubt, just beyond a reasonable doubt. You will be asked to con-

(Continued on following page)

Appellant argues that two separate aggravating circumstances cannot arise from the exact same conduct and animus. Appellant claims that this case does not involve two separate incidents, one a rape and one a kidnapping.

Footnote continued—

sider three possible sentences which include the death penalty—

“Mr. Meissner: Right.

“The Court: —as well as two options on the life sentence.

“Now, all that anybody is concerned about, and you’ve answered the question, really, on the death penalty question, would you also fairly consider all of the evidence with respect to whether or not the life sentence would appropriately be imposed? We want you to give—be sure you’ll give fair consideration to all of those.

“Mr. Meissner: Yes, I believe I would.”

The court’s questioning continued:

The Court: The Court is going to take the liberty of inquiring further and only in a very limited respect.

“Would you Mr. Meissner, listen to—I want to make an assumption now, a finding of guilt has been made and we are in the second phase of the trial, the second phase of the trial being, for lack of a better term, the penalty phase where the jury recommends what sentence will be—which they would recommend be imposed. Will you, sir, listen to all of the evidence that will be presented in that hearing, take into account the instructions of law by the Court, which will include instructions regarding the various alternatives in sentencing, consult with your fellow jurors, based upon the collective wisdom of the jury impose that—or recommend that sentence which you collectively believed appropriate, taking into account all the evidence and all of the law?

“Mr. Meissner: I could do that.”

While this dialogue does indicate that Meissner had an opinion about the death penalty, it does not suggest that he would be unable to correctly apply the law to a case. Thus, he also was not subject to a challenge for cause.

The final person challenged by appellant for cause, Peter P. Uhler, was questioned as follows:

“The Court: Very well. The death penalty, under certain circumstances, may be imposed in Ohio. Additionally

(Continued on following page)

Rather, he argues that the same behavior and intent the jury found to constitute rape were also the basis for its finding of kidnapping.

Footnote continued—

you would be asked to consider the possibility of the imposition of life imprisonment.

"Would you listen to the evidence and the law as it relates to both of those possible sentences and consider each of them fairly under the evidence and law that will be given to you?"

"Mr. Uhler: Yes."

The questioning continued:

"Mr. Yavorcik: Okay. And if someone is guilty you could fairly consider an appropriate punishment, whatever?"

"Mr. Uhler. Whatever.

"Mr. Yavorcik: You could look at all the options presented to you and make a decision fairly?"

"Mr. Uhler: Right.

"Mr. Yavorcik: Choosing one of those options?"

"Mr. Uhler: Right."

The court asked some additional questions:

"The Court: In the event you were called upon to consider the punishment in this case and, as you have basically been advised by the Court and both counsel, assuming a conviction that required full consideration of all possible penalties, you would be advised that you could consider the death penalty and life imprisonment. The most important consideration that we need to know from you now is would you give equal and fair consideration to both and to all of the circumstances that you must consider before making a decision as to what you would recommend to the Court?"

"Mr. Uhler: I don't know what you mean by that.

"The Court: I basically mean will you follow the law and not have any preconceived judgment about what would be most appropriate in this case?"

"Mr. Uhler: Yes. Right. I'd follow the law because as a citizen we're supposed to obey the laws of the nation, the government and so forth."

By his answers, Uhler also indicated that he would follow his instructions and oath when determining appellant's guilt or innocence, and when recommending a sentence. The trial court, therefore, properly ruled that he was not subject to a challenge for cause.

This same argument was put forth in *Jenkins* and this court found that the aggravating circumstances of aggravated robbery and kidnapping must be merged. *Jenkins* at 197-198 cited the rationale of *State v. Logan* (1979), 60 Ohio St. 2d 126 [14 O.O.3d 373], as follows:

“(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the *restraint is prolonged, the confinement is secretive, or the movement is substantial* so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

“(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions. [Emphasis added.]”

“As the *Logan* court recognized, the critical consideration ‘is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.’ *Id.* at 135. Cf. *State v. Price* (1979), 60 Ohio St. 2d 136, at 143 [14 O.O.3d 379].”

In *Jenkins* the restraint of movement involved in holding a robbery victim at gunpoint was found to be incidental to the actual robbery. In the instant case, however, it is not so clear that the restraint of movement necessary for appellant to rape Lisa Bates was the only restraint of movement considered by the jury. Appel-

lant somehow had to get Lisa inside his apartment before he raped and killed her. Applying the *Logan* guidelines, it is unclear how prolonged the restraint was in this case, although Lisa was inside appellant's apartment from 3:45 p.m. until the police found her body at approximately 11:55 p.m. Also, unlike the alleged kidnapping in *Jenkins* where the restraint took place in a public bank, appellant's restraint of Lisa was secretive, as it took place inside his apartment. Additionally, appellant's restraint of Lisa involved substantial movement. He evidently moved her up an outside stairway, into his apartment and then to his bedroom. Thus, this is not a case where the kidnapping is merely incidental to the rape. Such a case would be found where the only restraint involved was the holding of the victim in place while a defendant raped her. Accordingly, the specifications of kidnapping and rape are and were properly considered separately as aggravating circumstances.

Appellant also asserts that the trial court was required to instruct the jury as to the defendant's disposition were he found not guilty by reason of insanity. Appellant requested that the jury be instructed in part as follows:

"* * * If, however, the Court finds by clear and convincing evidence that the defendant is a mentally ill person subject to hospitalization or a mentally retarded person subject to institutionalization, this Court is required by law to commit the defendant to a hospital for treatment of mental illness or to an institution for care and treatment for mental retardation."

Appellant contends that this instruction was necessary because of the publicity given John Hinckley's release after being found not guilty by reason of insanity of shooting President Reagan. The court of appeals properly noted,

first, that the requested instruction was an incomplete statement of the law as contained in R.C. 2945.40 and, second, that the subject of disposition is a matter for the court and not for the jury and, thus, need not be considered by the jury. For these reasons, the trial judge did not abuse his discretion by refusing to give appellant's requested instruction.

Appellant next urges that the trial court was required to explain to the jury the difference between the insanity defense and the defendant's mental state as a mitigating factor. Appellant concedes that the trial court correctly instructed the jury on the insanity defense at the conclusion of the guilt phase of the trial, and correctly instructed the jury as to defendant's mental condition as a mitigating factor at the conclusion of the sentencing phase of the trial. He argues, however, that the judge failed to point out that the two standards are not identical, and to explain in detail the differences.

The trial court is required to give a full and correct statement of the law so that the jury can apply that law to the facts in evidence before it. In a capital case, the judge may not, by his statement of the law, restrict the mitigating factors the jury may consider. *Lockett v. Ohio* (1978), 438 U.S. 586 [9 O.O.3d 26]. Appellant did not advise the court as to how the mitigating factor of his mental state should be explained. Any attempt to define or explain may have been viewed as an attempt to restrict that factor, and would have been improper. Accordingly, the trial court's instructions regarding mitigating factors were complete and correct, and appellant's argument has no merit.

Appellant next claims he has the right to open and close arguments during the sentencing phase of the trial.

Appellant argues that since he has the burden of going forward with evidence of mitigation, he has the right to opening and closing arguments pursuant to R.C. 2315.01 (F). While appellant correctly recognizes his burden of going forward at the sentencing phase of a capital trial, the burden of persuasion remains on the state. The state must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors before the jury can recommend the death sentence. See R.C. 2929.03 (D). Thus, pursuant to R.C. 2945.10 (F), which sets forth the order of proceeding in a criminal case, the state has the right to open and close arguments to the jury.

Appellant contends further that the word "age," as used in R.C. 2929.02(A), 2929.023, 2929.03 and 2929.04, refers to his mental age, rather than his chronological age. Appellant argues that although chronologically he was forty-two years old at the time of the offense, his mental age was somewhere between ten and twelve years and, therefore, it was improper for the trial court to sentence him to death. It is settled law that when interpreting statutes, words should be given their plain meaning. Absent any indication to the contrary, the word "age" means chronological age and should be interpreted as such in this case. That is not to say that appellant's mental age is not a factor to be considered when determining the appropriateness of the death penalty. To the contrary, R.C. 2929.04 (B)(3) explicitly requires that defendant's mental capacity be weighed as a mitigating factor against imposition of the death penalty. Rather than twisting the meaning of the word "age" in order to preclude sentencing appellant to death, this court will consider appellant's very low mental age as an extremely weighty factor mitigating against the death penalty.

Appellant next proposes that the trial court had the authority to order the disclosure of the grand jury transcripts of cases sought by him, after he had filed a notice of appeal to the court of appeals. Appellant first argues that procedurally the trial court retained jurisdiction to order disclosure of the grand jury transcripts because this action would not be inconsistent with his appeal. Appellant relies on *State, ex rel. Special Prosecutors, v. Judges* (1978), 55 Ohio St. 2d 94 [9 O.O.3d 88], in which this court at 97 acknowledged that, although the general rule is that the trial court loses jurisdiction to take action in a cause after an appeal has been filed, it "does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment * * *." Appellant claims further that the grand jury transcripts are discoverable in this case because his particularized need for them outweighs the general policy that grand jury transcripts are to be kept secret. See *Crim. R. 6(E)* and *State v. Laskey* (1970), 21 Ohio St. 2d 187 [50 O.O.2d 432]. Appellant contends that the cases for which he requested transcripts are factually similar to his case, and should have been considered in the court of appeals' proportionality review.

Contrary to appellant's contentions the proper court to determine whether the requested grand jury transcripts would be helpful in deciding this case was the court of appeals. The trial court's only remaining jurisdiction over the case after appellant filed his notice of appeal allowed it to take action in aid of the appeal. See *Majnaric v. Majnaric* (1975), 46 Ohio App. 2d 157 [75 O.O.2d 250]. Thus, appellant petitioned the wrong court for disclosure.

Assuming, *arguendo*, that the trial court did have jurisdiction to allow disclosure of the grand jury tran-

scripts, it could not properly have done so. Crim. R. 6(E) delineates the degree of secrecy accorded grand jury proceedings. This court in *Laskey* at 191 stated that secrecy must be maintained unless the defense demonstrates that a particularized need for the transcripts outweighs the need for secrecy. In the instant case appellant claims that the cases requested were factually similar to his case, and that the court could not determine whether the death penalty was proportionate for his case without considering the facts of these other cases. The flaw in this logic is that the records requested were *grand jury* transcripts. Such transcripts present only the prosecutor's evidence for the purpose of determining whether a suspect should be indicted. They do not show even whether the accused was guilty, much less identify his penalty. The grand jury transcripts, therefore, could not have aided in the court's proportionality review. Accordingly, there was no particularized need for disclosure in this case, and appellant's argument has no merit.

Appellant further contends the trial court violated his right to a fair trial by permitting the media to televise, photograph and broadcast his trial. Appellant argues that C.P. Sup. R. 11 and Canon 3(A)(7) of the Code of Judicial Conduct violate due process. C.P. Sup. R. 11 provides in pertinent part:

"The judge presiding at the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings open to the public as provided in 3(A)(7) of the Code of Judicial Conduct. * * *

Canon 3(A)(7) of the Code of Judicial Conduct provides:

"A trial judge or appellate court should permit:

"* * *

"(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings; and

"(c) the broadcasting, televising, recording, and taking of photographs in the courtroom by news media during sessions of the court, including recesses between sessions * * *."

This court construed C.P. Sup. R. 11 and Canon 3 (A)(7) in *State, ex rel. Grinnell Communications Corp., v. Love* (1980), 62 Ohio St. 2d 399, 401 [16 O.O.3d 434], and held that broadcasting is permitted in the courtroom if the court determines that it would not distract participants, impair the dignity of the proceedings, or otherwise materially interfere with the achievement of a fair trial or hearing. In *Chandler v. Florida* (1981), 449 U.S. 560, the United States Supreme Court interpreted a canon of judicial conduct, similar to Canon 3(A)(7), promulgated by the Florida Supreme Court and held at 583.

"* * * [T]he Constitution does not prohibit a state from experimenting with a program [such as is] authorized by [Florida's] revised Canon 3A(7)."

The court also stated at 574-575:

"An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous mat-

ter. * * * [T]he appropriate safeguard against such [juror] prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.”

The court further stated at 578-579:

“Whatever may be the ‘mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process,’ *Estes v. Texas*, 381 U.S., at 587, at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media [in the courtroom] inherently has an adverse effect on that process.”

The court also stated at 582:

“* * * Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida’s experiment.”

The United States Supreme Court and the lawmakers of Ohio have instituted a system by which a balance may be struck between the public’s right to know what goes on in a public courtroom, and a defendant’s right to a fair and impartial trial. Since the procedures provided by this state were complied with, the media’s presence at appellant’s trial did not violate due process.

Next, appellant urges that the court of appeals erred by failing to disqualify itself from hearing this case when one of its members presided over the trial, even though

that judge was not part of the panel deciding the appeal. Appellant states that Judge Peter M. Handwork presided at the trial of this case in the Court of Common Pleas of Lucas County. Four days after he imposed the death sentence on appellant, Judge Handwork was elected to the Court of Appeals for Lucas County. He was a member of that court when this case came before it on appeal. The court was then composed of Judge Handwork, Judge John J. Connors, Jr., Judge Andy Douglas and Judge Alice Robie Resnick. Appellant argues that even though Judge Handwork did not participate in deciding appellant's case, he may have exerted subtle pressure on his colleagues to affirm. He argues further, if Judge Handwork did not actually exert any pressure on the court to affirm, it might appear to the public that this was happening. Appellant contends that the court of appeals should have recused itself from this case in order to demonstrate the "appearance of a detached impartiality."

It must first be noted that Section 5(C), Article IV of the Ohio Constitution and R.C. 2501.13 provide a procedure for answering questions regarding the disqualification of a judge from a case. The question must be submitted to the Chief Justice of the Ohio Supreme Court who assigns the matter to another judge or rules on it himself. Appellant submitted the question of disqualification of the entire Sixth Appellate District Court to Chief Justice Celebrezze. The Chief Justice on December 8, 1983 dismissed the affidavit of prejudice as being not well-taken. There is no authority allowing appellant to relitigate this issue. Thus, the Chief Justice's ruling is *res judicata* as to the question.

Even if we consider the merits of this issue, the state must prevail. Canon 3 of the Code of Judicial

Conduct in conjunction with *United States v. Haldeman* (C.A.D.C. 1976), 559 F. 2d 31, calls for disqualification only upon a reasonable question of impartiality. Appellant has presented no facts which reasonably suggest that the Sixth Appellate District's decision was biased. It must, therefore, be assumed that the court entered judgment following proper procedures, and in compliance with the law. Accordingly, appellant's argument is not well-taken.

Appellant also maintains the proportionality review, required by R.C. 2929.05(A), must include cases outside the court of appeals' own geographical jurisdiction. Appellant argues that the court of appeals' comparison of this case with the only other Sixth Appellate District case in which the death penalty was imposed was insufficient to determine whether the death penalty was appropriate for him. According to appellant, R.C. 2929.05(A) requires the court of appeals to use, at least, all the death penalty cases in the state as a basis for comparison. In analyzing this question it must first be noted that the United States Constitution does not require any form of proportionality review. *Pulley v. Harris* (1984), U.S., 79 L. Ed. 2d 29. It is thus up to the state of Ohio to determine the correct pool of cases for comparison at each level of review. A court of appeals has best access to, and most complete information about, the cases it decides itself. A comparison between the case before it and all other similar cases it has decided could, therefore, be extremely thorough and accurate. This would be less true if a court of appeals were required to compare a case before it to cases of which it had no prior knowledge. Furthermore, similar cases from the entire state would be available for comparison at

the Supreme Court level of review. Therefore, it is not reversible error that the court of appeals limited its proportionality review to cases adjudicated in the Sixth Appellate District.

II

We must now undertake the task of independently weighing the aggravating circumstances surrounding the murder of Lisa Bates against the factors appellant has presented which mitigate against the imposition of the death penalty. R.C. 2929.05 mandates this weighing process and states in pertinent part:

“* * * [T]he supreme court shall * * * review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case * * *.”

R.C. 2929.05 provides further:

“* * * [T]he supreme court shall affirm a sentence of death only if the * * * court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case * * *.”

In the instant case appellant was found guilty of committing two aggravating circumstances. First, appellant was found guilty of murder while committing or attempting to commit kidnapping. Second, appellant was found guilty of murder while committing or attempting to commit rape. During the sentencing phase of his

trial appellant presented evidence of the following mitigating factors: (1) his twelve-year institutionalization from age ten to age twenty-two, (2) his mental retardation, (3) his limited (third grade) education, (4) his limited ability to read and write, (5) his lack of familial support, and (6) his history of alcoholism. After careful consideration of the cumulative effect of these mitigating factors on appellant at the time he took the life of Lisa Bates, we can come to no other conclusion than that these factors do not outweigh the heinous nature of the aggravating circumstances surrounding her murder.

III

Our final determination must be whether the death sentence is appropriate in this case. R.C. 2929.05(A) provides in pertinent part:

“* * * [T]he supreme court shall * * * determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the * * * supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * *”

R.C. 2929.05 continues:

“* * * [T]he supreme court shall affirm a sentence of death only if * * * [it] is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case.”

In the instant case the circumstances surrounding the kidnapping, rape and murder of seven-year-old Lisa Bates leave us hard pressed to conceive of a situation in which the death sentence would be more appropriate.

Capital punishment can not be viewed as excessive in this case when compared to its imposition in *Jenkins* for murder coupled with armed robbery. Nor can it be considered excessive in light of *State v. Maurer, supra*, where the death penalty was imposed for murder coupled with kidnapping. A review of these cases and the other cases in Ohio where the death penalty has been imposed has led this court to the conclusion that capital punishment is neither excessive nor disproportionate to the penalty imposed in similar cases. We, therefore, affirm the court of appeal's finding that the death sentence is appropriate in this case.

IV

In conclusion, we first find that there is no merit to any of the specific issues raised by appellant concerning the proceedings below. Second, we find that the aggravating circumstances of kidnapping and rape outweigh any and all of the mitigating factors presented by appellant. Third, we find the sentence of death to be appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases. Thus, in accordance with R.C. 2929.05(A) we affirm the conviction and sentence of death in this case.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES and C. BROWN, JJ., concur.

WRIGHT, J., concurs in part and dissents in part.

W. BROWN, J., retired, of the Supreme Court of Ohio, sitting for DOUGLAS, J.

WRIGHT, J., concurring in part and dissenting in part. I concur with Justice William Brown's well-reasoned opinion except for that portion dealing with the imposition of the death penalty. The Ohio Revised Code places upon each member of this court the heavy burden of reviewing anew the record and independently weighing the aggravating circumstances against those factors mitigating against the death sentence. The appellant committed a heinous and outrageous crime, the nature of which cries out for the maximum sentence provided by law. The aggravating factors clearly outweigh the mitigating circumstances—save one. It is undisputed that the appellant has a mental and emotional age of a child between the ages of ten and twelve years.

I recognize that my position will not be one that is popular; however, I cannot sanction the electric chair for a person with the mentality of a child in the fifth grade. Accordingly, I would vote for a life sentence with thirty years of actual incarceration.

Thus, I must respectfully dissent from the majority holding as to the penalty to be imposed on appellant.

ORDER OF THE SUPREME COURT OF OHIO

(Dated June 5, 1985)

Case No. 84-784

THE SUPREME COURT OF OHIO
COLUMBUS

CORRECTED ENTRY

STATE OF OHIO,
Appellee.

v.

BILLY ROGERS, a.k.a RAYMOND LEE HUDSON,
Appellant.

JUDGMENT ENTRY

Appeal From the Court of Appeal.

This cause, here on appeal from the Court of Appeals for LUCAS County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons stated in the opinion filed herein.

Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the Court of Common Pleas is now past, it is hereby ordered by this Court that said sentence be carried into execution by the Superintendent of the Southern Ohio Correctional Institute, or, in his absence, by the Deputy Superintendent on the 5th day of August, 1985, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Institute and that said Superintendent shall make due return thereof to the Clerk of the Court of Common Pleas.

It is further ordered that appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for LUCAS County for entry.

/s/ FRANK D. CELEBREZZE
Chief Justice

**OPINION OF THE COURT OF APPEALS OF OHIO,
SIXTH APPELLATE DISTRICT, LUCAS COUNTY**

(Decided March 10, 1984)

C.A. No. L-82-344

IN THE COURT OF APPEALS
OF LUCAS COUNTY

STATE OF OHIO,
Plaintiff-Appellee,

v.

BILLY ROGERS, ALIAS RAYMOND LEE HUDSON,
Defendant-Appellant.

OPINION

1. Ohio's statutory scheme for the imposition of the death penalty is not violative of the equal protection, due process or cruel and unusual punishment clauses of the Ohio or United States Constitutions in that the statutory scheme bears a rational relation to a legitimate state interest and the sentencing procedures set forth therein provide for the exercise of discretion by the sentencing body within specific enumerated statutory guidelines subject to full judicial review.

2. The bifurcation of the trial of a capital offense, providing for guilt and penalty phases held before the same factfinding body, is not violative of the accused's right to a fair and impartial trial nor does such bifurcation place the accused in jeopardy twice for the same offense.

3. Upon reviewing Ohio's statutory scheme for the imposition of the death penalty and the procedures set forth therein, we hold that Ohio's capital punishment statute is proper and constitutionally sound in all respects.

4. A trial court may permit inquiry regarding the prospective jurors' general attitudes toward the death penalty during voir dire. However, no juror may be excused for cause on the ground that he or she has a preconceived opinion regarding the death penalty where he or she affirms his or her ability to render a fair and impartial verdict in accordance with law despite his or her personal beliefs regarding the issue.

5. Revised Code 2929.03(D)(1), which provides that the sentence of death may not be imposed as a penalty for aggravated murder if the offender was less than eighteen years of age at the time of the commission of the offense and raised the matter of age at trial, contemplates chronological and not mental age.

6. In the absence of a determination that the broadcasting of court proceedings would materially interfere with the achievement of a fair trial, the broadcasting of court proceedings *shall* be permitted in accordance with Sup. R. 11 and Canon 3(A)(7) of the Code of Judicial Conduct. To rule otherwise would significantly jeopardize the exercise of the First Amendment guarantee of free speech and we hold today that any encroachment upon the freedom of the press endangers not only the rights of the public as a whole but those rights guaranteed each individual in our society as well.

DOUGLAS, J. This case comes before this court on appeal from judgment of the Lucas County Court of Common Pleas, wherein appellant, Billy Rogers, was found guilty of aggravated murder with specifications and was sentenced to death.

On Saturday afternoon, November 14, 1981, Lisa Bates, a seven-year-old girl, was observed with three other children and appellant on the porch of a house located at 415 Harve Street in Toledo, Ohio. Appellant lived in an apartment on the second floor of the house. At the time, appellant was entertaining the children with magic tricks.

The other children were eventually called home, leaving Lisa Bates alone with appellant. A few minutes later, Lisa's bicycle was observed standing in front of appellant's house but neither appellant nor Lisa were seen outside the premises.

When Lisa Bates had not returned home by 7:00 p.m. that evening, her mother reported her missing to the Toledo Police Department. A search of the neighborhood was instituted and, sometime after 11:45 p.m., Toledo Police Sergeant Dennis Schlmeyer obtained appellant's consent to search his apartment where Lisa's body was discovered on the floor of a closet in appellant's bedroom. Appellant was, thereafter, placed under arrest.

Dr. Renate Fazekas, the forensic pathologist of the Lucas County Coroner's office, found evidence of sexual molestation and determined that the cause of death was strangulation. On November 18, 1981, the Lucas County Grand Jury returned an indictment, charging appellant with two counts of aggravated murder in violation of R.C. 2903.01 (B) with specifications of aggravating circumstances as to each count, pursuant to R.C. 2929.04.

On November 23, 1981, appellant's counsel raised the issue of appellant's competency to stand trial. On May 4, 1982, following two psychological examinations ordered by the trial court pursuant to R.C. 2945.371 and an evidentiary hearing, the trial court found appellant competent to stand trial.

Appellant, thereafter, entered written pleas of not guilty and not guilty by reason of insanity and the trial court ordered further psychological examinations of appellant, pursuant to R.C. 2945.39, to evaluate appellant's mental condition at the time of the commission of the offense.

On June 30, 1982, appellant moved to suspend further prosecution in the case on the ground that he could not receive a fair trial on his plea of insanity because of the pervasive publicity denouncing the defense of insanity which followed the returning of a verdict of not guilty by reason of insanity in the case of *U.S. v. John W. Hinckley, Jr.* (D.D.C., 1982), Crim. No. 81-306. On July 26, 1982, the trial court denied appellant's motion to suspend further prosecution in the case.

On July 26, 1982, appellant moved to dismiss the indictment on the ground that the 1981 amendments defining aggravated murder and authorizing the imposition of the death penalty were unconstitutional. On August 13, 1982, the trial court denied said motion.

On August 19, 1982, appellant moved to prohibit television cameras from recording appellant's trial, which motion was denied. On August 20, 1982, appellant moved to bifurcate the trial proceedings regarding his pleas of not guilty and not guilty by reason of insanity on the ground that the trial of the pleas in the same proceeding

would prejudice the jury's consideration of evidence supporting the insanity defense. On September 2, 1982, the trial court denied appellant's motion to bifurcate the trial proceedings. Appellant then moved to withdraw his plea of not guilty and stand solely on the plea of not guilty by reason of insanity. That motion was also denied.

On September 7, 1982, appellant's trial commenced. After four days of voir dire, a jury was empaneled and the state began the presentation of its evidence. On September 21, 1982, the presentation of all the evidence regarding the guilt phase of appellant's trial was concluded.

On September 22, 1982, the jury returned its verdict, finding appellant guilty of aggravated murder while committing or attempting to commit rape and of both specifications of kidnapping and rape as charged in the second count of the indictment.

Following the return of the verdict, appellant requested a presentence investigation and psychological examination pursuant to R.C. 2929.03(D). The trial court granted appellant's request but ordered the Court Diagnostic and Treatment Center to conduct the psychological examination, over appellant's objection.

Prior to the commencement of the sentencing phase of appellant's trial, appellant moved to abrogate the sentencing hearing or bar introduction of further evidence relating to the aggravating circumstances on the ground of double jeopardy. On September 27, 1982, the trial court denied said motion. Appellant, then, requested that he be permitted to open and close the presentation of evidence and arguments at the sentencing hearing, which request was also denied.

On September 28, 1982, the sentencing phase of appellant's trial commenced. On September 29, 1982, the jury returned its verdict, recommending a sentence of death. On October 29, 1982, the trial court denied appellant's post-trial motions to vacate judgment and to stay judgment on the jury's recommendation of the death penalty. That same day, the trial court rendered its judgment, as required by R.C. 2929.03(F), setting forth the reasons why the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt in this case and ordering the imposition of the death sentence as recommended by the jury.

From that judgment, appellant timely instituted this appeal, presenting twenty-six assignments of error.

Before proceeding to our discussion of appellant's assignments of error, we note that the state has urged the application of the doctrine of waiver with regard to appellant's third, fourth, fifth, sixth, eighth, sixteenth, eighteenth, twenty-fifth and twenty-sixth assignments of error on the basis that the errors alleged therein, having not been presented to the trial court, may not be considered on appeal in accordance with the decisions of the Ohio Supreme Court in *State v. Gordon* (1971), 28 Ohio St. 2d 45; *State v. Lancaster* (1971), 25 Ohio St. 2d 83 and *State v. Childs* (1968), 14 Ohio St. 2d 56.

Although we recognize the efficacy of the doctrine and of the state's argument urging its application in this case, we must reject its application herein because we deem it to be our responsibility to review the merits of all matters raised and arguments made by an appellant where the issue of life and death is involved. We shall, therefore, proceed to consider the merits of appellant's assignments of error.

Appellant's first assignment of error is presented as follows:

"1. The trial court erred in denying appellant's motion to dismiss the indictment for the reason that it violated federal and state constitutional guarantees.

"I. The statutory scheme for imposition of the death penalty violates the Equal Protection Clauses of the Federal and Ohio State Constitutions by improperly discriminating between persons convicted of aggravated murder.

"II. The statutory scheme for imposition of the death penalty violates the Due Process Clauses and the Cruel and Unusual Punishment Clauses of the Federal and State Constitution (sic) by failing to provide proper guidance to the sentencing body in determining whether the death penalty shall be imposed.

"III. The statutory scheme for the imposition of the death penalty violates the Cruel and Unusual Punishment Clauses because there has been no showing by the State of Ohio that the death penalty is both necessary and is the least restrictive means available to accomplish the objectives of the administration of justice.

"IV. The statutory scheme for imposition of the death penalty violates the Equal Protection Clauses and the Cruel and Unusual Punishment Clauses because it fails to control the arbitrariness inherent in sentencing decisions.

"V. The Statutory scheme for imposition of the death penalty violates the Equal Protection Clause and the Cruel and Unusual Punishment Clause because

its sentencing alternatives to the death penalty are so minimal that the jury is more likely to vote for death."

In his first assignment of error, appellant contends that the statutory scheme for the imposition of the death penalty violates the Equal Protection Clauses of the Ohio and United States Constitutions by improperly discriminating between persons convicted of aggravated murder. In support of his contention, appellant urges our consideration of R.C. 2903.01(B) and R.C. 2929.04(A)(7) which provide as follows:

"R.C. 2903.01(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit *kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.*" (Emphasis added.)

"R.C. 2929.04(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

* * *

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit *kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.*" (Emphasis added.)

Appellant argues that the foregoing statutory sections improperly discriminate between persons convicted of aggravated murder in that the same conduct which gives rise to a violation of R.C. 2903.01 (B) constitutes the aggravating circumstances which render the violation a capital offense pursuant to R.C. 2929.04(A) (7).

It is clear upon careful consideration of the statutory sections at issue that the legislature determined that a certain classification of felony murder offenses required the imposition of a more severe penalty in the interest of protecting the citizens of this state from those crimes determined to be particularly heinous crimes. In reaching that determination, we note that the legislature not only narrowed the classification of offenses for which the death penalty may be imposed but also limited the imposition thereof to cases in which "... either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

Considering the foregoing, we hold that the Ohio Statutory Scheme for imposing the death penalty does not violate the Equal Protection Clauses of the Ohio and United States Constitutions in that the legislation bears a rational connection to a legitimate state interest and that the classification of certain offenses as more heinous than others lies within the prerogatives of the legislature. See *Gregg v. Georgia* (1976), 428 U.S. 153, particularly at paragraphs (1)(d) and (e) of the syllabus wherein the court's conclusions were summarized as follows:¹

"(d) Legislative measures adopted by the people's chosen representatives weigh heavily in ascer-

1. See *U.S. v. Detroit Lumber Co.* (1906), 200 U.S. 321, 337.

taining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since *Furman*, *supra*, was decided, Congress and at least 35 States have enacted new statutes providing for death penalty. Pp. 179-183.

"(e) Retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in determining whether the death penalty should be imposed, and it cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong. Pp. 183-187."

Appellant further contends that the statutory scheme for the imposition of the death penalty violates the Equal Protection Clauses, Due Process Clauses and Cruel and Unusual Punishment Clauses of the Ohio and United States Constitutions by failing to provide proper guidance to the sentencing body in determining whether the death penalty shall be imposed and in failing to control the arbitrariness inherent in sentencing decisions.

In support of his contention, appellant argues that the Ohio statutory scheme for imposing the death penalty does not provide sufficient standards to prevent the capricious or arbitrary imposition of the death penalty and is, therefore, unconstitutional in light of the United Supreme Court's decisions in *Woodson v. North Carolina* (1976), 428 U.S. 280, *Gregg v. Georgia*, *supra*, and *Furman v. Georgia* (1972), 408 U.S. 238.

In *Furman v. Georgia*, *supra*, the United States Supreme Court struck down Georgia's capital punishment

statute as violative of the Eighth Amendment's prohibition against cruel and unusual punishment, a plurality of the court holding that a state may not impose a capital sentence pursuant to sentencing procedures which create a substantial risk of arbitrary and capricious imposition of the death penalty by lodging the sentencing decision in the unbridled discretion of the sentencing body. In *Woodson v. North Carolina*, *supra*, however, the United States Supreme Court held that a capital punishment statute that mandated the imposition of the death penalty in certain circumstances without providing the sentencing body with discretion to consider the character of the individual offender and the circumstances of the particular violation was also constitutionally infirm as violative of the Eighth Amendment.

Thus, the United States Supreme Court's decisions have mandated that the sentencing procedures in imposing the death penalty must strike a delicate balance, permitting the sentencing body discretion to consider the particular circumstances of each case but requiring that such discretion be exercised within specific statutory guidelines. See *Gregg v. Georgia*, *supra*, wherein the United States Supreme Court upheld the capital punishment statute enacted by the Georgia Legislature in response to the court's decision in *Furman v. Georgia* on the ground that the statutory scheme provided sufficient safeguards through specific statutory guidelines for the imposition of the death penalty and judicial review of the sentencing determination.

Applying the foregoing standards to the Ohio capital punishment statute, we hold that Ohio's statutory scheme for imposing the death penalty is not constitutionally

infirm as violative of the Equal Protection Clauses, Due Process Clauses or Cruel and Unusual Punishment Clauses of the Ohio and United States Constitutions for the reason that the sentencing procedures provide for the exercise of discretion by the sentencing body within specific enumerated statutory guidelines subject to full judicial review thereof. See R.C. 2929.01 et seq.

Appellant further contends that the Ohio statutory scheme for the imposition of the death penalty violates the Cruel and Unusual Punishment Clauses of the Ohio and United States Constitutions for the reason that there has been no showing by the State that the death penalty is both necessary and the least restrictive means available to accomplish the objectives of the administration of justice.

Upon consideration of the case law and appellant's argument, we find appellant's contention not well taken for the reason that the United States Supreme Court has clearly determined that the imposition of capital punishment is not unconstitutional per se and that the legislature "... is not required to select the least severe penalty possible" *Gregg v. Georgia*, *supra*, at paragraph (1)(b) of the syllabus. Further, see *id.*, at 178-181 and *Furman v. Georgia*, *supra*, at 451, Justice Powell dissenting.

Finally, in support of his first assignment of error, appellant contends that the Ohio Statutory Scheme for the imposition of the death penalty violates the Equal Protection Clauses and the Cruel and Unusual Punishment Clauses of the Ohio and United States Constitutions for the reason that the sentencing alternatives are so minimal that the jury is more likely to impose the death penalty.

In support of his contention, appellant argues that the death penalty is more attractive to a jury because of the possibility of parole after either twenty or thirty years pursuant to the life imprisonment sentencing alternative. Upon consideration of the appellant's contention, we find it not well taken for the following reasons:

1. The sentencing alternatives provide for life imprisonment with parole *eligibility* after serving twenty or thirty years. Since parole may or may not in fact be granted, a particular offender may remain imprisoned for life.

2. Although a legislature may not impose penalties which are excessive, the determination of the penalties to be imposed for various offenses and the length thereof clearly lies within the legislative prerogative. See *Rummel v. Estelle* (1980), 445 U.S. 263, particularly at 274.

For the foregoing reasons, appellant's first assignment of error is found not well taken.

Appellant's second assignment of error is presented as follows:

- "2. The sentence of death imposed upon the appellant is excessive and disproportionate when compared with sentences imposed in similar cases and is a violation of the Equal Protection, Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court, however, has foreclosed itself from acquiring sufficient data to make this determination."

In his second assignment of error, appellant contends that the imposition of the death penalty in this case is

excessive and disproportionate when compared to the sentences imposed in similar cases. Appellant further contends that this court has precluded proper appellate review of this issue by virtue of its ruling, rendered June 7, 1983, limiting the universe of cases to be considered to "... any other similar cases, in the 6th District, wherein the death penalty has been charged, where there has been a conviction of the crime charged, with or without the specification, a conviction of a lesser crime than originally charged or a plea to a lesser offense wherein the specification has been dismissed."

Revised Code 2929.05(A) sets forth the procedures for appellate review of death sentences, providing, in pertinent part, as follows:

"In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

The threshold issue presented by this assignment of error is whether this court's determination of the universe of case to be considered in accordance with the mandate of R.C. 2929.05(A) is constitutionally sound. Our review of the case law reveals that although the United States Supreme Court has commended comparative proportionality review on a state wide basis, it has never determined that such review is constitutionally mandated. See *Proffitt v. Florida* (1976), 428 U.S. 242 and *Gregg v. Georgia*, *supra*, particularly at 204, n. 56. Further, see *Pulley v. Harris* (1984), 52 U.S.L.W. 4141, particularly at pp. 4144-4145, wherein the court clarified its previous decisions with regard to this issue, holding as follows:

"* * * While emphasizing the importance of mandatory appellate review under the Georgia statute, *id.*, at, we did not hold that without comparative proportionality review the statute would be unconstitutional. To the contrary, we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.

"There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course."

We further note that appellant is afforded the additional protection provided by the requirement that the Ohio Supreme Court must also review this issue and may decide, on the basis of its greater jurisdictional authority, to consider similar cases throughout the state.

Considering the foregoing, we adhere to our decision limiting the universe of cases to be considered by this court, in accordance with the requirements of R.C. 2929.05 (A), to those other similar arising within this court's jurisdiction.

With regard to appellant's contention that the imposition of the death penalty in this case is excessive and disproportionate, we find that appellant has, essentially, relied upon his argument that this court's limitation of the universe of cases to be considered precluded effective appellate review of this issue. We shall, therefore, defer our consideration of whether appellant's sentence is excessive or disproportionate to the penalty imposed in similar cases until our review of the sentencing determination, in accordance with R.C. 2929.05(A), at the close of our consideration of appellant's assignments of error.

We, therefore, find appellant's second assignment of error not well taken.

Appellant's third, fifth and twenty-first assignments of error are presented as follows:

"3. By permitting the venire to be 'death-qualified', the appellant's Sixth and Fourteenth Amendment right to a fair and impartial jury guaranteed by the Federal and State Constitutions were violated.

"I. Excluding death penalty opponents results in a jury which is more likely to convict the Defendant and is therefore not impartial.

"II. Excluding the panel of death penalty opponents results in a jury which is not drawn from a fair cross-section of the community.

"III. Death-qualification of the jury is improper because the trial judge ultimately imposes the death sentence; therefore, by asking voir dire questions concerning the death penalty in this case the trial court

violated the appellant's right guaranteed under the Eighth and Fourteenth Amendments and Article I Sections 9 and 16 of the Ohio Constitution.

"5. The trial court erred to the prejudice of the appellant and violated his Sixth and Fourteenth Amendment rights to a fair and impartial jury by asking its own 'death-qualifying' question to potential jurors that neither conforms to *Witherspoon v. Illinois* nor Ohio statutory mandates.

"21. The trial court erred when it overruled the appellant's challenges for cause, thereby denying him a fair trial guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

In his third, fifth and twenty-first assignments of error, appellant contends that the trial court violated his constitutional rights to a fair and impartial jury by permitting the venire to be "death qualified" and by denying appellant's challenges for cause of three prospective jurors who had indicated during voir dire that they had preconceived opinions regarding either the death penalty and/or the defense of insanity.

Our review of the record reveals that the following procedure was followed in examining the prospective jurors with respect to their states of mind regarding the death penalty and the insanity defense. After a general examination by the trial court and counsel in open court, each prospective juror was examined individually in chambers regarding his or her attitude toward these issues. The trial court opened the examination with a general explanation of the law regarding the death penalty in

Ohio and inquiry into the juror's opinion thereof. The trial court then permitted counsel to examine the jurors with respect to this issue and the process was repeated with regard to the issue of the insanity defense.

If a juror indicated that he or she had a predisposition toward either issue, inquiry was made as to whether the juror could apply the law as instructed by the court notwithstanding his or her personal views. No challenges for cause, by either defense counsel or the state, were granted if a juror affirmed that he or she would apply the law as instructed in accordance with his or her duties as a juror.

In *Witherspoon v. Illinois* (1968), 391 U.S. 510, the United States Supreme Court considered this issue, holding, as summarized in the third and fourth paragraphs of the syllabus, as follows:

"3. A man who opposes the death penalty, no less than one who favors it, *can make the discretionary choice of punishment entrusted to him by the State and can thus obey the oath he takes as a juror*; but in a nation where so many have come to oppose capital punishment, a jury from which all such people have been excluded cannot perform the task demanded of it—that if expressing the conscience of the community on the ultimate question of life or death. P. 519.

"4. Just as a State may not entrust the determination of whether a man is innocent or guilty to a tribunal organized to convict, so it may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death; and no sentence of death can be carried out,

regardless of when it was imposed, if the voir dire testimony indicates that the jury that imposed or recommended that sentence was chosen by excluding veniremen for cause *simply because they voiced general objections to capital punishment or expressed conscientious or religious scruples against its infliction.* Pp. 521-523." (Emphasis added.)

Further, R.C. 2945.25(C) and Crim. R. 24(B)(9) provide that:

"R.C. 2945.25 A person called as a juror in a criminal case may be challenged for the following causes:

* * *

"(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

"Crim. R. 24(B) Challenge for cause. A person called as a juror may be challenged for the following causes:

* * *

"(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of

the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial."

Applying the foregoing to the procedures utilized in the case sub judice, we find that the trial court's carefully constructed inquiry was made with due regard for appellant's rights and in complete accordance with the law. We further find that the trial court properly denied appellant's challenges for cause in view of each juror's clear affirmation of his ability to disregard his personal views and render an impartial judgment according to the law as explained by the trial court. Finally, upon reviewing in its entirety the language used by the trial court in its inquiry regarding these issues, we find appellant's contention that the use of the phrase "in this case" was prejudicial to appellant not well taken.

For the foregoing reasons, we find appellant's third, fifth and twenty-first assignments of error not well taken.

Appellant's fourth assignment of error is presented as follows:

"4. Ohio's death penalty statute is violative of the Sixth and Fourteenth Amendments of the United States Constitution in that it fails to allow for the impaneling of a separate jury for the second-stage of the bifurcated trial."

In his fourth assignment of error, appellant contends that his constitutional rights to a fair trial and impartial jury require the impaneling of a second jury to hear the penalty phase of his trial.

Revised Code 2929.03 sets forth the procedures for imposing sentence for a capital offense, providing at (C) (2) as follows:

“(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

“(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

“(b) *By the trial jury and the trial judge, if the offender was tried by jury.*” (Emphasis added.)

In *Proffitt v. Florida, supra*, and *Gregg v. Georgia, supra*, the United States Supreme Court approved, as constitutionally valid, such bifurcated proceedings held before the same fact finding body. Thus, a separate jury is not required by either the Ohio statute or constitutional principals.

Further, one practical aspect regarding the bifurcated procedure should be considered, to wit: that the state has the burden of proving that the aggravating circumstances outweigh the mitigating circumstances in the pen-

alty phase and must, by necessity, reiterate the circumstances of the offense in detail. This would be necessary whether the penalty phase is presented to the same jury or a different jury and the cumulative effect, if any, would therefore not be unreasonable or unfair in any event.

For those reasons, we find appellant's fourth assignment of error not well taken.

Appellant's sixth assignment of error is presented as follows:

"6. The trial court erred and denied appellant his due process right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution when it instructed the jury at the sentencing phase that the sentencing determination was merely a recommendation, thereby placing an irrelevant and arbitrary factor into the jury's deliberations, and seating a jury which favored the death penalty."

In his sixth assignment of error, appellant contends that the trial court's jury instruction, advising the jury that their sentencing determination constituted a recommendation to the trial court, violated appellant's constitutional rights by lessening the jury's responsibility for their decision.

We find appellant's sixth assignment of error not well taken for the reason that statutory procedures for sentencing such as provided in the Ohio statutory scheme have previously been upheld by the United States Supreme Court and the instruction given by the trial court

merely set forth said procedures. See *Proffitt v. Florida*, *supra*, particularly at 248-249, and *Gregg v. Georgia*, *supra*.

Appellant's seventh assignment of error is presented as follows:

"7. The trial court erred in dismissing appellant's petition for disclosure of evidence presented to the grand jury in similar cases."

Our review of the record discloses the following pertinent information. On October 29, 1982, the trial court rendered final judgment in this case. On November 29, 1982, appellant filed his notice of appeal to this court. On April 25, 1983, appellant filed a petition in the Lucas County Court of Common Pleas, seeking an order requiring disclosure of evidence presented to the Lucas County Grand Jury in similar cases. On May 5, 1983, the trial court dismissed appellant's petition for lack of jurisdiction. On June 7, 1983, this court entered judgment, determining the universe of similar cases to be utilized and ruling on this issue as follows:

"The appellant's motion to supplement the record with a transcript of proceedings before the Lucas County Grand Jury in the case of State of Ohio v. Jonathan Lawrence Grosjean, 82-6432 on the docket of the Court of Common Pleas of Lucas County is hereby denied pursuant to Crim. R. 6(E)."

Criminal Rule 6(E) provides that:

"(E) Secrecy of proceedings and disclosure. Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may

be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

Adhering to our decision, we find appellant's seventh assignment of error not well taken for the following reasons:

- 1.) That the trial court properly determined that it lacked jurisdiction to hear appellant's petition

in that appellant had already filed his notice of appeal. See *Majnaric v. Majnaric* (1975), 46 Ohio App. 2d 157.

2.) That this court previously determined this issue in its decision and judgment entry, filed June 7, 1983, referred to above.

3.) That R.C. 2929.05(A) requires comparison of penalties imposed in similar cases, which we construe as requiring consideration of the record in those cases, including the transcript of proceedings and decisions rendered but not the proceedings before the grand jury.

4.) That proceedings before the Grand Jury are generally accorded confidentiality. See Crim. R. 6(E).

Appellant's eighth assignment of error is presented as follows:

"8. The trial court erred in failing to instruct the jury at the sentencing hearing concerning the difference between the defense of insanity and the mitigating factor appearing at Section 2929.04(A)(3), O.R.C."

Our review of the record reveals that the trial court gave the following instruction to the jury with regard to the defense of insanity:

"The plea of not guilty by reason of insanity raises the issues of the insanity of the Defendant at the time of the commission of the act.

"To establish the defense of insanity, the accused must prove by a preponderance of the evidence that at the time of the offense, as a result of mental ill-

ness or defect, he did not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law. In other words, the Defendant must prove by a preponderance of the evidence that due to the disease or defect of mind either he did not know the act was wrong or did not have the ability to refrain from doing the act.

"A person is insane and not responsible for criminal conduct if at the time of the act he has a mental illness or defect and such mental illness or defect impaired his reason and his reason was so impaired that he did not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law.

"In other words, a person is insane if a mental illness or defect so impaired his mental power to understand the nature and consequences of his act that he did not know that the particular act was wrong or that he did not have the ability to avoid committing the criminal act."

At the conclusion of the sentencing hearing, the trial court instructed the jury with regard to the mitigating factor of diminished capacity, set forth in R.C. 2929.04 (B) (3), as follows:

"Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless, in fairness and mercy, may be considered by you as extenuating or reducing the degree of the Defendant's blame or punishment.

"These mitigating factors include but are not limited to the nature and circumstances of the offense, the

history, character and background of the offender, and any or all of the following factors as set forth in the statute; number one, whether the victim of the offense induced or facilitated it; number two, whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation; number three, *whether at the time of committing the offense the offender, because of a mental disease or defect, lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law*; four, the youth of the offender; five, the offender's lack of a significant history of prior criminal convictions and delinquency adjudications; number six, if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the act that led to the death of the victim; and seven, any other factors that are relevant to the issue of whether the offender should be sentenced to death."

Although appellant concedes that the foregoing are correct statements of the law, he contends that the trial court did not sufficiently distinguish the defense of insanity from the mitigating factor of diminished capacity. We do not agree.

Our review of the record reveals that the trial court set forth the law with regard to both issues strictly in accordance with the statutes and that the trial court's instructions regarding the mitigating factors were, at least, as equally detailed as that regarding the defense of in-

sanity. In fact, our review of the record discloses that the trial court instructed the jury as to each mitigating factor set forth in R.C. 2929.04(B) even where no evidence had been presented as to the particular factor in question.

For the foregoing reasons, we find appellant's eighth assignment of error not well taken.

Appellant's ninth assignment of error is presented as follows:

"9. The trial court erred when it overruled Defendant's Motion to Suspend Prosecution in violation of his right to due process and right to trial by an impartial jury guaranteed him by the Sixth and Fourteenth Amendments to the United States and Article I, Section 10, of the Ohio Constitution."

In his ninth assignment of error, appellant contends that the trial court erred in denying appellant's motion to suspend prosecution on the ground that he could not receive a fair trial on his plea of insanity because of the pervasive publicity denouncing the defense of insanity which followed the returning of a verdict of not guilty by reason of insanity in the case of *U.S. v. John W. Hinckley, Jr.*, *supra*.

In *State v. Swiger* (1966), 5 Ohio St. 2d 151, the Ohio Supreme Court considered the analogous issue of the determination of an application for change of venue based upon the alleged existence of prejudice in the community and held, in the first paragraph of the syllabus, as follows:

"1. The examination of jurors on their voir dire affords the best test as to whether prejudice exists

in the community against the defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion."

Considering the foregoing, our review of the transcript of the voir dire discloses the following pertinent information. At the close of the general voir dire, each prospective juror was examined individually in the trial court's chambers with regard to the issues of capital punishment and the defense of insanity. The examination included specific questions regarding the *Hinckley* case and the publicity attendant thereto.

Our review of those examinations clearly demonstrates that the jurors did not have such preconceived opinions regarding the insanity defense, either generally or as a result of the publicity surrounding the verdict rendered in the *Hinckley* case, so as to prejudice appellant or prevent him from having a fair trial. In fact, the record indicates that most of the prospective jurors actually knew very little about the *Hinckley* case or the public debate engendered thereby.

Applying the standards set forth by the Ohio Supreme Court in *Swiger, supra*, to the foregoing facts and circumstances, we find that the trial court did not err in denying appellant's motion to suspend prosecution and that appellant was not prevented from having a fair trial for the reason that the record establishes that those called for examination as prospective jurors affirmed their ability to render a fair and impartial verdict upon the evidence

presented in accordance with law. We, therefore, find appellant's ninth assignment of error not well taken.

Appellant's tenth assignment of error is presented as follows:

"10. The televising, photographing and recording of the trial violated Defendant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment."

In his tenth assignment of error, appellant contends that his right to a fair trial was violated by the trial court's order of September 3, 1982, permitting the televising, recording and photographing of the proceedings subject to certain restrictions in accordance with Sup. R. 11, which sets forth the conditions for broadcasting and photographing court proceedings.

Sup. R. 11 provides, in pertinent part, as follows:

"The judge presiding at the trial or hearing shall permit the broadcasting or recording by electronic means and the taking of photographs in court proceedings open to the public as provided in Canon 3A(7) of the Code of Judicial Conduct. * * *"

Further, Canon 3A(7) of the Code of Judicial Conduct provides as follows:

"(7) A trial judge or appellate court should permit:

* * *

"(b) the broadcasting, televising, recording or photographing of investitive, ceremonial, or naturalization proceedings; and

(c) the broadcasting, televising, recording, and taking of photographs in the courtroom by news media *during sessions of the court*, including recesses between sessions, . . .” (Emphasis added.)

The Ohio Supreme Court construed Sup. R. 11 and Canon 3A(7) of the Code of Judicial Conduct in *State, ex rel. Grinnell Communications Corp., v. Love* (1980), 62 Ohio St. 2d 399, holding, at 401, as follows:

“Thus, the Canons are *mandatory in nature, not directory*. Under Canon 3A(7)(c) *the trial judge shall permit broadcasting in the courtroom*, pursuant to permission obtained in advance in writing and under conditions prescribed by the court and Rules of Superintendence, 3A(7)(c)(i), only if the court determines that such broadcasting would not distract participants, impair the dignity of the proceedings, or otherwise materially interfere with the achievement of a fair trial or hearing, 3A(7)(c)(ii). In other words, *unless one of these disqualifying factors is found to be present, broadcasting is to be permitted*. Further, exposure of victims or witnesses who object thereto may be prohibited ‘if the court determines that there is a reasonable cause for such objection,’ 3A(7)(c)(iii).”

The Ohio Supreme Court also considered the constitutional issues raised with respect to the broadcasting of court proceedings in that case and determined that *Estes v. Texas* (1965), 381 U.S. 532 did not create a per se prohibition against electronic media coverage of courtroom proceedings. Having so determined, the court proceeded to hold, at 402-403, that “. . . until there is a pronouncement on the federal constitutional issues by (the United States Supreme Court) contrary to the tacit presumption of fairness under-

pinning Sup. R. 11 and Canon 3 as espoused by this court, *the Canon and Rule are the law of this state.*" (Emphasis added).

In *Chandler v. Florida* (1981), 449 U.S. 560, the United States Supreme Court issued such a pronouncement, upholding a similar canon of judicial conduct promulgated by the Florida Supreme Court and holding, as summarized in the syllabus, as follows:

"The Constitution does not prohibit a state from experimenting with a program such as authorized by Florida's Canon 3A(7). Pp. 569-583.

(a) This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, is confined to evaluating it in relation to the Federal Constitution. P. 570.

(b) *Estes v. Texas*, *supra*, did not announce a constitutional rule that all photographic, radio, and television coverage of criminal trials is inherently a denial of due process. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 when *Estes* was decided, and is, even now, in a state of continuing change. Pp. 570-574.

(c) An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, conduct of the broadcasting process or prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The appropriate safeguard against juror prejudice is the defendant's right

to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. Pp. 574-575.

(d) Whatever may be the 'mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process,' *Estes v. Texas*, *supra*, at 587, at present no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. Pp. 575-580.

(e) Nor have appellants shown either that the media's coverage of their trial—printed or broadcast—compromised the jury's ability to judge them fairly or that the broadcast coverage of their particular trial had an adverse impact on the trial participants sufficient to constitute a denial of due process. Pp. 580-582.

(f) Absent a showing of prejudice of constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment. P. 582."

Considering the foregoing, it is clear that there is no constitutional prohibition against permitting the broadcasting of court proceedings provided that such coverage is subject to those conditions and restrictions necessary to insure that the accused is afforded a fair trial. More im-

portantly, however, the structuring of those conditions and restrictions provides a method by which a balance may be struck between the public's right to know and the accused's right to a fair and impartial trial.

Both of these rights are central to our democratic system and, as such, should be accorded the greatest respect and utmost protection. Although the accused must be afforded every protection provided by our system, the right of the public to know must also be protected and history has demonstrated that the best guarantee of that right is the existence of a free press.

These rights need not come in conflict. Indeed, the rights of the individual have been protected and enhanced on many occasions as the result of the unfettered operation of the press. Thus, today we hold that any encroachment upon the freedom of the press endangers not only the rights of the public as a whole but those rights guaranteed each individual in our society as well.

Procedures such as those provided by Sup. R. 11 and Canon 3(A)(7) of the Code of Judicial Conduct permit the balancing of both of these rights. Our review of the record discloses that the trial court structured its order in accordance with Sup. R. 11 so as to permit the broadcasting of the proceedings without infringing upon appellant's right to a fair and impartial trial.

For the foregoing reasons, we find appellant's tenth assignment of error not well taken.

Appellant's eleventh assignment of error is presented as follows:

"11. The trial court erred in denying appellant's motion for bifurcation of the trial proceedings."

In his eleventh assignment of error, appellant contends that the trial court erred in denying his motion to bifurcate the trial proceedings with respect to his pleas of not guilty and not guilty by reason of insanity. In support of his contention, appellant argues that the presentation of evidence with respect to both pleas in the same proceeding would appear contradictory to the jury and would prejudice appellant's case.

Although we agree that entering alternative pleas generally involves taking contradictory positions, our review of the statutes and caselaw discloses no constitutional or statutory requirement that the proceedings regarding the issue of guilt and the defense of insanity be bifurcated. See R.C. 2945.10; *Proffitt v. Florida*, *supra*; *Gregg v. Georgia*, *supra*; *McGautha v. California* (1971), 402 U.S. 183, particularly at 210, wherein the court, citing *Spencer v. Texas* (1967), 385 U.S. 554, held as follows:

"To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. *Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.* With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such

a step would be quite beyond the pale of this Court's proper function in our federal system.' "

Further, our review of the record reveals no showing by appellant of any particularized need for bifurcation of these issues in this case and we cannot say that the trial court abused its discretion in denying appellant's motion to bifurcate the proceedings as to his pleas of not guilty and not guilty by reason of insanity. We, therefore, find appellant's eleventh assignment of error not well taken.

Appellant's twelfth assignment of error is presented as follows:

"12. The trial court erred in overruling appellant's motion for leave to withdraw his plea of not guilty."

In his twelfth assignment of error, appellant contends that the trial court, having denied appellant's motion to bifurcate the proceedings regarding the issue of guilt and the defense of insanity, erred in denying appellant's motion for leave to withdraw his plea of not guilty.

While we believe that it would have been the better practice to have permitted appellant to withdraw his plea of not guilty in this case in order to avoid even the appearance of unfairness, we do not find that the trial court's denial of appellant's motion for leave to withdraw his plea of not guilty constituted prejudicial error for the following reasons:

1. The determination of a motion to withdraw a plea lies within the sound discretion of the trial court and such determination will not be reversed

on appeal in the absence of a showing of an abuse of discretion. See *State v. Smith* (1977), 49 Ohio St. 2d 261. Our review of the record in this case reveals nothing to indicate that the trial court abused its discretion in denying appellant's motion to withdraw his plea of not guilty.

2. Further, we find that appellant was not prejudiced by the trial court's denial of his motion in that all the information which would have been presented during the guilt phase of appellant's trial could have been presented by the state during the penalty phase of the trial to prove that the aggravating circumstances outweighed the mitigating circumstances.

We, therefore, find appellant's twelfth assignment of error not well taken.

Appellant's thirteenth assignment of error is presented as follows:

"13. The trial court erred in overruling appellant's motion to vacate its judgment on the jury's verdict of guilty of the specifications of aggravating circumstances."

In this thirteenth assignment of error, appellant contends that the trial court erred in denying appellant's motion to vacate its judgment on the jury's verdict finding appellant guilty of both specifications of kidnapping and rape. In support of his contention, appellant argues that he cannot be convicted of both kidnapping and rape when the convictions are based upon the same conduct.

We note, at the outset, that appellant's argument is based upon R.C. 2941.25(A), which ". . . prohibits

cumulative punishment of a defendant for the same criminal act where his conduct can be construed to constitute two statutory offenses, when, in substance and effect, only one offense has been committed." *State v. Roberts* (1980), 62 Ohio St. 2d 170 at 172-173. (Emphasis added.) Appellant's analysis is, therefore, inappropriate in this case for the reason that the judgment, finding appellant guilty of both specifications rather than one specification, does not operate to impose upon appellant any additional punishment.

Further, we note that the offenses of kidnapping and rape are not allied offenses of similar import per se but may constitute two separate offenses even when arising out of the same conduct where the evidence demonstrates that the offenses were committed with "separate animus." See *State v. Logan* (1979), 60 Ohio St. 2d 126, wherein the Ohio Supreme Court held in the syllabus as follows:

"In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25 (B), this court adopts the following guidelines:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase

in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.” (Emphasis added.)

Applying the foregoing standard to the facts and circumstances of this case, we find that the record does contain evidence tending to establish that the kidnapping and rape were committed with “separate animus” in that the asportation of the victim subjected her to a substantial increase in risk of harm separate from that involved in the underlying crime.

Considering the foregoing, we find appellant’s thirteenth assignment of error not well taken for the reason that appellant’s analysis regarding allied offenses of similar import is inappropriate in this case in that separate sentences were not imposed for those offenses and the evidence tends to establish that the offenses were not allied offenses of similar import.

Appellant’s fourteenth assignment of error is presented as follows:

“14. The trial court erred in overruling appellant’s motion to stay judgment on the jury’s recommendation of the death penalty on the grounds that the lower court’s sentencing procedure was arbitrary and violative of the due process clause of the U.S. and Ohio Constitutions.”

In his fourteenth assignment of error, appellant contends that the trial court erred in denying appellant’s motion to stay judgment on the jury’s recommendation of the death penalty on the ground that the sentencing procedure was arbitrary in that the trial court failed

to articulate the method by which it determined that the aggravating circumstances outweighed the mitigating circumstances.

We note that the process of "weighing" aggravating circumstances versus mitigating circumstances is not capable of quantitative analysis. Rather, the process involves a total weighing of all aggravating circumstances and all mitigating circumstances. It further involves a consideration of the content of those factors in light of the unique circumstances of each case.

Thus, it is sufficient for effective appellate review that the sentencing court set forth the factors considered and the reasons underlying the decision rendered. This is especially true where the appellate court is also required to conduct its own independent review and to reach its own conclusion as to whether the aggravating circumstances outweigh the mitigating circumstances.

The foregoing requirement further necessitates the stay of the judgment rendered by the trial court throughout the appellate process and therefore renders unnecessary any application for a stay in the trial court. We further note that this court, in fact, issued a stay in this case.

For those reasons, appellant's fourteenth assignment of error is found not well taken.

Appellant's fifteenth assignment of error is presented as follows:

"15. The trial court erred in overruling appellant's motion to abrogate the sentencing hearing or to bar introduction of evidence by the State of Ohio at that hearing on the grounds that defendant was twice placed in jeopardy in violation of the U.S. and Ohio Constitutions."

In his fifteenth assignment of error, appellant contends that Ohio's procedure for imposing the death penalty violated appellant's constitutional rights by placing him in jeopardy a second time for the same offense during the sentencing phase of appellant's trial for the reason that the state was afforded a second opportunity to present evidence regarding the aggravating circumstances.

Ohio's statutory scheme for imposing the death penalty provides for the bifurcation of the guilt and penalty phases of an accused's trial. The statute further places the burden of proving that the aggravating circumstances outweigh the mitigating circumstances on the state. In order to comply with the mandates of the statute, the state must present evidence tending to establish the aggravating circumstances in the penalty phase as well as in the guilt phase.

Although evidence that was presented to the jury in the guilt phase may be reintroduced in the penalty phase as a result of this procedure, we do not find that the procedure offends constitutional prohibitions against placing a defendant in jeopardy twice for the reason that the phases are, in fact, two segments of the same proceeding. Further, we find that the procedure followed in this case was in accordance with Ohio statutory requirements and that the United States Supreme Court has previously upheld as constitutionally sound similar statutory schemes providing for bifurcated trials in capital cases. See *Proffitt v. Florida*, *supra*, and *Gregg v. Georgia*, *supra*. We, therefore, find appellant's fifteenth assignment of error not well taken.

Appellant's sixteenth assignment of error is presented as follows:

"16. The trial court erred in failing to instruct the jury in the sentencing hearing that a verdict by a majority or by an evenly-divided jury was acceptable."

In his sixteenth assignment of error, appellant contends that a sentencing verdict recommending life imprisonment may be rendered by a majority or by an evenly-divided jury if agreement cannot be reached as to whether the aggravating circumstances outweigh the mitigating circumstances.

Although appellant's theory is quite interesting, it is clearly not supported by the statute which requires a unanimous finding, recommending either the death penalty or life imprisonment with parole eligibility after either twenty or thirty years. See R.C. 2929.03(D)(2), Crim. R. 31(A).

We, therefore, find appellant's sixteenth assignment of error not well taken.

Appellant's seventeenth assignment of error is presented as follows:

"17. The trial court erred in denying appellant's request for permission to open and close the arguments at the conclusion of the sentencing hearing."

In his seventeenth assignment of error, appellant contends that appellant should have been permitted to open and close the arguments at the sentencing hearing for the reason that R.C. 2929.03(D) places the burden of going forward with the evidence of any factors in mitigation of the imposition of the death penalty upon the defendant.

R.C. 2929.03(D) (1) further provides, however, that:

"The prosecution *shall have the burden of proving*, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."
(Emphasis added.)

Considering the foregoing, we find that the trial court did not err in denying appellant's request to open and close the arguments at the sentencing hearing for the reason that the burden of proof remained with the state. We further note, however, that if we had found any error in the trial court's so ruling, it would be harmless beyond a reasonable doubt.

We, therefore, find appellant's seventeenth assignment of error not well taken.

Appellant's eighteenth assignment of error is presented as follows:

"18. The trial court erred in overruling appellant's motion for mistrial on the grounds that one of the defendant's evaluating psychiatrists was not provided the complete referral package of records by the Court which has been given to evaluating psychiatrists at the CDTC, all in violation of defendant's due process, equal protection and effective counsel guarantees."

In his eighteenth assignment of error, appellant contends that the trial court should have granted appellant's motion for mistrial on the ground that appellant's evaluating psychiatrist was not provided with the records

which the prosecutor's office had supplied to the Court Diagnostic and Treatment Center.

Upon consideration of the record, we find appellant's eighteenth assignment of error not well taken for the following reasons:

1. Neither appellant nor the psychiatrist selected by appellant ever requested the records in question.

2. The various records and documents exhibited by appellant at trial were in far more detail than the records in question. Further, it is clear that no one could have known appellant or appellant's history better than appellant himself. For those reasons, we find that appellant was not and could not have been prejudiced by the failure to obtain the records in question.

Appellant's nineteenth assignment of error is presented as follows:

"19. The trial court erred when it denied appellant's request to have mental examinations conducted pursuant to O.R.C. Section 2929.03(D), by someone other than the CDTC, thereby denying appellant a fair trial as guaranteed by the Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10, of the Ohio Constitution."

In his nineteenth assignment of error, appellant contends that the trial court erred in ordering, over appellant's objection, that the mental examination requested by appellant prior to the sentencing hearing be conducted by the Court Diagnostic and Treatment Center.

Revised Code 2929.03(D)(1) provides, in pertinent part, as follows:

"When death may be imposed as a penalty, the court, upon the request if the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code."

Upon consideration of the foregoing, we find that the statute provides only that the trial court shall order a mental examination at the request of a defendant but does not mandate the appointment of any particular examiner. Thus, the determination as to whom shall be appointed to conduct the examination lies within the sound discretion of the trial court and we cannot say that the trial court abused its discretion in appointing the Court Diagnostic and Treatment Center to conduct the examination of appellant.

For that reason, we find appellant's nineteenth assignment of error not well taken.

Appellant's twentieth assignment of error is presented as follows:

"20. The trial court erred and denied appellant a fair trial guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution and by Article I, Section 10 of the Ohio Constitution when it overruled appellant's motion to require the production of the Lucas County Adult Probation Department presentence investigation report prepared in (sic) earlier criminal case."

In his twentieth assignment of error, appellant contends that the trial court erred in denying appellant's motion for disclosure of a pre-sentence probation report prepared and filed in an earlier criminal case in which appellant was convicted of sexual battery.

Revised Code 2951.03 provides, in pertinent part, that: "Such written report of investigation by the probation officer *shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.*" (Emphasis added.)

Further, see Crim. R. 32.2(C).

Thus, R.C. 2951.03 and Crim. R. 32.2(C) provide that probation reports shall remain confidential in the absence of a court order directing otherwise. Further, R.C. 2951.03 and Crim. R. 32.2(C) specifically provide that the determination to permit disclosure of such reports lies within the sound discretion of the trial court.

Applying the foregoing to the facts and circumstances of the case sub judice, we find appellant's twentieth assignment of error not well taken for the reason that the record is devoid of any indication that the trial court abused its discretion in denying appellant's request for disclosure of the probation report. In so holding, we further note that the record clearly demonstrates that far more information than could possibly have been contained in that report was presented at trial and that appellant was, therefore, not prejudiced by the trial court's decision to preserve the confidentiality of the probation report.

Appellant's twenty-second assignment of error is presented as follows:

"22. The trial court erred in failing to instruct the jury on defendant's disposition in the event the jury found him NGRI, in violation of defendant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution."

In his twenty-second assignment of error, appellant contends that the trial court erred in denying appellant's request for the following jury instruction regarding the disposition of a defendant upon a finding of not guilty by reason of insanity:

"If, however, the Court finds by clear and convincing evidence that the defendant is a mentally ill person subject to hospitalization or a mentally retarded person subject to institutionalization, this court is required by law to commit the defendant to a hospital for treatment of mental illness or to an institution for care and treatment for mental retardation."

Upon consideration of the foregoing, we find that the requested instruction was not a complete statement of the law in accordance with the provisions of R.C. 2945.40. Further, the requested instruction concerns disposition, a determination for the court and not for the jury and, thus, not an appropriate matter for the jury's consideration. See *State v. Johnson* (1978), 57 Ohio App. 2d 263. In fact, as the Court of Appeals for Franklin County held, at 152, in the case of *State v. Boham* (1971), 29 Ohio App. 2d 142, "To have given (such instruction), and supplied such ramifications as were necessary to a

full explanation, would have been prejudicial to this defendant."

For those reasons, we find appellant's twenty-second assignment of error not well taken.

Appellant's twenty-third assignment of error is presented as follows:

"23. The lower court erred in failing to instruct the jury on the definition of specific intent in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Section 2903.01 (D) of the Ohio Revised Code."

In his twenty-third assignment of error, appellant contends that the trial court erred in failing to instruct the jury on the element of specific intent as requested by appellant.

We find appellant's twenty-third assignment of error not well taken for the reason that our review of the record reveals that the requested instruction was not a correct statement of the law and that the trial court properly instructed the jury on the element of purpose in accordance with R.C. 2903.01(D).

Appellant's twenty-fourth assignment of error is presented as follows:

"24. The trial court erred in imposing the death sentence upon appellant when his mental age was between ten (10) and twelve (12) years in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and Sections 2929.023, 2929.03(D)(1) and 2929.05(C) of the Ohio Revised Code."

In his twenty-fourth assignment of error, appellant contends that the trial court erred in imposing the death penalty upon appellant, who was forty-one at the time of the commission of the offense, for the reason that appellant was a "minor" by reason of his mental age, which appellant's expert witnesses testified to being between ten and twelve. In support of this contention, appellant argues that R.C. 2929.03(D)(1) prohibits the imposition of the death penalty upon a defendant whose mental age is that of a minor.

Revised Code 2929.03(D)(1) provides in pertinent part, as follows:

"Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense."

Considering the foregoing, we find appellant's twenty-fourth assignment of error not well taken for the reason that the statute is clearly phrased in chronological terms and contemplates chronological age not mental age.

Appellant's twenty-fifth assignment of error is presented as follows:

"25. The trial court erred in instructing the jury that it was barred from considering sympathy in arriving at its decision as to the penalty to be imposed on the defendant, thereby violating the defendant's right to trial by a fair and impartial jury and his right to due process of law as guaranteed by the Federal and State Constitutions."

In his twenty-fifth assignment of error, appellant contends that the trial court erred in instructing the jury at the close of the penalty phase as follows:

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your effort must be to arrive at a just verdict, and to do so please consider all of the evidence and make your—make your finding with intelligence and impartiality and without bias, sympathy or prejudice so that the State of Ohio and the Defendant will feel that their case was fairly and impartially tried."

Appellant argues that the foregoing language precluded the jury's consideration of the mitigating evidence presented by appellant. In support of his argument, appellant urges our consideration of the California Supreme Court's opinion in *People v. Easley* (1983), 196 Cal. Rptr. 309, wherein the court held, at 320, as follows:

"The instruction that was given, however, was not by its terms limited to 'factually untethered' sympathy, but simply told the jury that 'you must not be influenced by pity for a defendant' and 'you must not be swayed by mere sentiment [or] sympathy.' In light of the teaching of *Lockett*, *Eddings* and *Robertson*, we have no doubt but that it was error for the trial court to give such an instruction at the penalty phase."

The specific instruction at issue in *Easley* was as follows:

“ ‘As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.’ ” (Emphasis added.) *Id.*, at 319.

Contrasting the instruction in the case sub judice with that in *Easley, supra*, we find the instruction given in *Easley* far more prejudicial than the general statement made by the trial court in this case regarding the jury's duty to render a verdict based upon the evidence presented.

We further note that the trial court also instructed the jury with respect to the mitigating factors as follows:

“What are mitigating factors? Mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless, *in fairness and mercy*, may be considered by you as extenuating or reducing the degree of the Defendant's blame or punishment.

“These mitigating factors include but are not limited to the nature and circumstances of the offense, the history, character and background of the offender, and any or all of the following factors as set forth in the statute; number one, whether the victim of the offense induced or facilitated it; number two, whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation; number three, whether at the time of committing the offense the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; four, the youth of the offender; five, the offender's lack of a significant history of

prior criminal convictions and delinquency adjudications; number six, if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim; and seven, *any other factors that are relevant to the issue of whether the offender should be sentenced to death.*" (Emphasis added.)

Considering the foregoing, we find that appellant was clearly given a fair hearing at the penalty stage and we cannot say that appellant was prejudiced by the trial court's general statement regarding passion, prejudice and sympathy even if such were determined to have been in error. Noting that a defendant is entitled to a fair trial, not a perfect trial, we find appellant's twenty-fifth assignment of error not well taken.

Appellant's twenty-sixth assignment of error is presented as follows:

"26. The trial court erred in admitting evidence of the defendant's request to consult counsel after his arrest."

In his twenty-sixth assignment of error, appellant contends that the trial court erred in permitting testimony regarding appellant's request to consult with counsel after his arrest.

Our review of the record reveals that appellant's assertion of his right to counsel was raised in the following line of questioning:

"(Cross examination of Toledo Police Officer Marx by Mr. Callahan, counsel for appellant.)

Q. Officer Marx, Mr. Yavorcik in his Direct Examination of you earlier said that you were the chief investigating officer of this case; is that the correct term for your function in this case?

A. Yes, sir.

Q. Thank you. Now, when you talked with Billy Rogers on the morning of November 15, 1981, did you go beyond the questions that you testified that you asked him on Direct Examination?

A. Yes.

Q. I believe they extended from his name and address through what his education was?

A. Yes, I did.

Q. You went further than that?

A. I did.

Q. What else did you ask him?

A. *Are you referring to the rights?*

Q. Yes.

A. Yes, I did.

Q. When did you give him his rights?

A. At approximately 2:00 a.m. I asked Mr. Rogers to read aloud to me from the waiver of rights form.

Q. And did he read it to you?

A. Yes, he did.

Q. Did he have difficulty reading it?

A. Not to the degree that it was noticeable that I took a note indicating so.

Q. But you were able to understand what he said?

A. That's correct.

Q. Now, that was the second time he had been given his rights that evening? Do you know that the officers at the scene gave him his rights?

A. I did not know that.

Q. Then you asked him questions about the incident of the evening, is that correct?

A. Yes.

Q. What did he tell you?

A. I asked Mr. Rogers to tell me why he had been brought to the police station. His comment was that the officers brought him to the station. He continued and he stated that his landlord—he didn't name him. He stated the landlord came to the door, and he, Mr. Rogers, let the landlord in. Two or three minutes later the officers came. He told me that the landlord let the officers in. He didn't know that anyone was in his apartment and he didn't know why he was brought to the Safety Building. At that point is when I informed him that he was brought to the Safety Building because the little girl's body had been found in his closet. That was—it was at that point in time that we went through the Miranda rights.

Q. *And what did he say after you had given him his Miranda rights?*

A. His comment to me after reading the third paragraph, and I would quote, *'I would like to talk to an attorney first.'*

Q. That's what he said?

A. Yes, sir.

Q. Of course that was his right to do that, was it not?

A. That's correct.

Q. And you respected that?

A. That's correct.

Q. You did not ask him any further questions?

A. No, sir.

Q. And no further questions have been asked of him until this day, as far as you know, by the law enforcement authorities?

A. To my knowledge none have." (Emphasis added.)

Upon consideration of the foregoing, we find that the officer testified to appellant's exercise of his right to counsel only in response to a question posed by appellant's counsel and, subsequently, offered no argument in response to counsel's statement that appellant had merely exercised a right to which he was lawfully entitled. Thus, no implications were made with respect to appellant's assertion of his right to counsel and any error which may have occurred as a result thereof was self induced. We, therefore, find appellant's twenty-sixth assignment of error not well taken.

We shall now proceed to consider those issues which this court is required to review and determine in accordance with the mandates of R.C. 2929.05(A), to wit: whether the aggravating circumstances appellant was found guilty of committing outweigh the mitigating factors in the case, whether the sentence of death is appropriate, whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, whether the evidence

supports the finding of aggravating circumstances and whether the sentencing court properly weighed the aggravating circumstances and the mitigating factors.

In the case sub judice, appellant was found guilty of two specifications of aggravating circumstances, pursuant to R.C. 2929.04(A)(7), that the aggravated murder was committed while appellant was committing, or attempting to commit, kidnapping and rape.

Our examination of the testimony and evidence presented clearly sustains the jury's determination, finding appellant guilty of the aggravating circumstances as specified, and reveals that the nature and circumstances of this offense were as follows. On Saturday afternoon, November 14, 1981, Lisa Bates, then seven years old, was seen with appellant on the porch of the house in which appellant lived. Although there was no direct testimony as to the events that followed, the physical evidence found in appellant's apartment and upon appellant's person and the results of the forensic examination of the victim's body indicate that appellant lured Lisa Bates to his apartment where he brutally raped her and then strangled her to death with a length of folding cloth.

Revised Code 2929.04(B) sets forth seven circumstances to be considered in mitigation of the imposition of the death penalty. The first and second factors to be considered are set forth as follows:

“(1) Whether the victim of the offense induced or facilitated it;

“(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;”

Our examination of the testimony and evidence presented discloses absolutely no evidence that the victim, Lisa Bates, induced or facilitated the offense or that appellant was under duress, coercion or strong provocation. Revised Code 2929.04(B)(1) and R.C. 2929.04(B)(2) are, therefore, not applicable in this case.

We shall consider the third factor, set forth in R.C. 2929.04(B)(3), at the close of our discussion of the mitigating circumstances. The fourth factor to be considered in mitigation is set forth as follows:

"(4) The youth of the offender;"

Since the evidence establishes that appellant was forty-one at the time of the commission of the offense, age is not a factor to be considered in mitigation.

The fifth factor to be considered is set forth as follows:

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;"

Our examination of the evidence reveals that appellant had a lengthy criminal record, extending throughout his life, involving offenses of a similar nature. Revised Code 2929.04(B)(5) is, therefore, also inapplicable in this case.

The sixth factor to be considered in mitigation is as follows:

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;"

The evidence presented discloses nothing to indicate that any person other than appellant was involved, in any way, in the kidnapping, rape and murder of Lisa Bates. Revised Code 2929.04(B)(6) is, therefore, not a factor to be considered in mitigation in this case.

The remaining factors to be considered are set forth in R.C. 2929.04(B)(3) and R.C. 2929.04(B)(7) as follows:

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

The evidence presented, in both the guilt and penalty phases of appellant's trial, reveals that appellant has led an unhappy and deprived life since early childhood. At age ten, he left an unhappy and culturally deprived home to be institutionalized in the Missouri State School in Marshall, Missouri, where he became involved in homosexual activities.

At age 22, appellant left the school to begin a life of directionless wanderings and frequent involvement with the law, largely resulting from illicit sexual activities with minors. Although appellant was institutionalized on various occasions as a result of his illegal activities, it appears that he received little assistance with his problems until a previous criminal conviction in Lucas County brought him into contact with various local social agencies and charitable organizations. As a result thereof,

appellant began to make some progress with his problems and had become marginally self sufficient.

Our review of the evidence presented further reveals that appellant was mildly mentally retarded and suffered from alcoholism. However, despite these circumstances, appellant was, at the time of the offense, working regularly, living alone and providing for his basic needs by himself. In fact, appellant had made sufficient progress to have admitted, in a counseling session a few days before the tragic death of Lisa Bates, that having sex with children was wrong and that he should stop doing so.

That acknowledgment strengthens the testimony given by one of the expert witnesses, Dr. Thomas G. Sherman, M.D., indicating that appellant was capable of appreciating that his conduct was wrong and that his conduct in committing this offense was knowing and purposeful. The testimony of Dr. Sherman was further corroborated by appellant's conduct upon arrest indicating his understanding of the legal process and his rights and various statements made by appellant, to a cellmate and to the various psychological examiners, indicating his understanding that his conduct was wrong.

Although the evidence clearly establishes that appellant was a man of limited capabilities, who had led a tragic life, these factors must be weighed against the particularly heinous nature of the offense and aggravating circumstances therefore, to wit: that the aggravated murder was committed while committing kidnapping and rape, offenses determined by the legislature to be of the most serious and heinous nature. In considering the evidence presented to establish the aggravating circumstances,

we find that the forensic examination of the victim's body and the discovery of certain paraphernalia clearly showed that Lisa Bates, a seven year old girl, had been brutally raped, both vaginally and anally, before she was strangled to death.

Weighing the mitigating factors of appellant's limited mental and social abilities and alcoholism against the particularly heinous nature of the aggravating circumstances of this offense, we find that the aggravating circumstances clearly outweigh the mitigating factors beyond a reasonable doubt.

We shall now consider whether the sentence of death imposed upon appellant was excessive or disproportionate to the penalty imposed in similar cases. The only case which has been presented for our consideration in accordance with our order of June 7, 1983, is *State v. Grosjean*, Cr 82-6432, in which a three-judge panel dismissed the specification of aggravating circumstances pursuant to Crim. R. 11(C)(3) upon its determination that the mitigating factors of appellant's youth and lack of significant criminal history outweighed the aggravating circumstances charged to wit: that the murder was committed during the commission of a robbery.

In so determining, the panel further reasoned as follows:

"In this regard the court has considered the relationship of the parties, the psychological background of the defendant, and the fact that the killing unquestionably resulted because of the strained relationship rather than any initial intent to rob the victim."

Contrasting the facts and circumstances of the *Grosjean* case with those of the case sub judice, we find that

the imposition of the death penalty in this case is not excessive or disproportionate to that imposed in *State v. Grosjean* because the aggravating circumstances established in this case were of a far more serious and heinous nature than that charged in *Grosjean* and the circumstances presented in mitigation were far less weighty than those presented in *Grosjean*.

Considering the foregoing, we find that the evidence presented sustained the finding of aggravating circumstances in this case, that the aggravating circumstances outweigh the mitigating circumstances, that the sentence of death imposed upon appellant was appropriate in this case, and that the sentencing court properly so determined. We further find Ohio's capital punishment statute and the procedures set forth therein proper and constitutionally sound in all respects.

Finally, we note that three motions, filed by appellant, remain pending in this case. Two of those motions, entitled "Motion to expand scope of review" and "Motion to defer decision" essentially contest this court's order of June 7, 1983, setting the universe of cases to be considered in determining whether the imposition of the death penalty in this case was excessive or disproportionate. The third motion, entitled "Motion For Access To Materials *Dehors* The Record" seeks access to any materials, outside the record, considered by this court in its proportionality review of the imposition of the death penalty in this case.

Adhering to our decision of June 7, 1983, appellant's motion to expand scope of review and motion to defer decision are found not well taken and the same are, hereby, denied. Appellant's motion for access to materials *dehors* the record is also found not well taken and the same is,

hereby, denied for the reason that the court has considered only those materials of record, presented to it in accordance with its order of June 7, 1983.

On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and judgment of the Lucas County Court of Common Pleas is affirmed.

We observe that normal procedure upon entering judgment is for this court to remand the case to the trial court with specific instructions either for execution of sentence or for further proceedings depending upon the decision rendered. We further observe, however, that appellant has an automatic appeal as of right to the Ohio Supreme Court pursuant to R.C. 2929.05. For that reason, we order the clerk of this court to file a copy of this opinion with the clerk of the Ohio Supreme Court within fifteen days of the issuance of this opinion in accordance with R.C. 2929.05 (A). We further order a continuance of the stay of execution of sentence granted by this court on September 12, 1983, pending appeal to the Ohio Supreme Court. Costs to abide final determination by the Supreme Court of Ohio.

JUDGMENT AFFIRMED.

CONNORS, P.J., and RESNICK, J., concur.

**ORDER OF THE COURT OF APPEALS OF OHIO,
SIXTH APPELLATE DISTRICT, LUCAS COUNTY**

(Dated March 10, 1984)

No. L-82-344

**IN THE COURT OF APPEALS
OF LUCAS COUNTY**

STATE OF OHIO,
Appellee

vs.

BILLY ROGERS, ALIAS RAYMOND LEE HUDSON

JOURNAL ENTRY

The court finds all of appellant's assignments of error, including subparts thereof, not well taken.

The court further finds that the evidence presented sustains the finding of aggravating circumstances herein; that the aggravating circumstances outweigh the mitigating circumstances; that the sentence of death imposed upon appellant was appropriate; and that the sentencing court properly so determined. The court further finds Ohio's capital punishment statute and the procedures set forth therein proper and constitutionally sound in all respects.

The court further finds that the three remaining pending motions filed by appellant herein, being entitled "Motion to expand scope of review", "Motion to defer

decision" and "Motion for Access to Materials *Dehors* the Record", are not well taken and same are denied.

Judgment of the Lucas County Common Pleas Court is affirmed. The appellant having an automatic appeal as of right to the Ohio Supreme Court under authority of R.C. 2929.05, the clerk of this court is ordered to file a copy of the opinion on file herein with the Clerk of the Ohio Supreme Court within fifteen (15) days of the issuance of this opinion in accordance with R.C. 2929.05 (A).

It is further ordered that the stay of execution of sentence granted by this court on September 12, 1983, is continued pending appeal to the Ohio Supreme Court. Costs to abide final determination by the Supreme Court of Ohio. See Opinion by Douglas, J., on file.

**OPINION OF THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO**

(Filed October 29, 1982)

No. CR81-6906

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

BILLY ROGERS, aka RAYMOND LEE HUDSON,

Defendant.

OPINION

BACKGROUND

This case originated with the filing of an indictment on November 18, 1981, against the defendant, Billy Lee Rogers, charging him with Aggravated Murder in each of two counts in the indictment. Each count of the indictment alleged two specific specifications, thus qualifying the case as a capital punishment case under the laws of the State of Ohio.

On November 23, 1981, the defendant was present in court with his attorney Mr. John Callahan and was initially arraigned. The arraignment proceeding as well as all further matters in this case were handled by the

undersigned Judge of the Lucas County Common Pleas Court.

Since the original date of arraignment the docket sheet reflects an extensive process of trial preparation including competency evaluations, not guilty by reason of insanity evaluations, a motion to suppress and hearings thereon. Numerous other motions all of which were heard and ruled upon during the course of the pre-trial preparation and or during the course of the guilt or non-guilt trial and the sentencing trial were filed. All rulings on said motions are reflected on the docket sheet of the case file.

GUILT OR NON-GUILT TRIAL

The guilt or non-guilt trial of the defendant, Billy Rogers, commenced on September 7, 1982 with the process of jury selection. On September 10, 1982 the jury was empanelled and sworn. This jury consisted of twelve regular members and four alternates. The twelve regular members of the jury included nine women and three men.

On September 13, 1982 the State commenced its case by producing evidence on the charge of Aggravated Murder as set forth in the two counts of the indictment, each of which contained two specifications.

During the course of the trial, the State of Ohio presented twenty witnesses and the defense presented eight. The thrust of the State's case was designed to prove the elements of each count as well as the elements of the specifications alleged. The thrust of the defense case was to present the defense of not guilty by reason of insanity. In the Court's judgment, following the presentation of all of the evidence, there was absolutely

no doubt that Billy Rogers was the sole perpetrator of the acts alleged and the only question for the jury to determine was whether or not he was sane at the time of the commission of the offense.

After receiving proper instructions of law from the Court which were applicable to the guilt or non-guilt issue in the first trial and, upon due deliberation, the trial jury did, on September 22, 1982 find the defendant guilty of the second count of the indictment, together with findings of guilt as to the two specifications contained therein.

The aggravating circumstances which the defendant, Billy Rogers was found guilty of committing were:

. . . that said offense was committed while Billy Rogers was committing or attempting to commit Kidnapping . . . ;

. . . that said offense was committed while Billy Rogers was committing or attempting to commit Rape. . . .

SENTENCING PROCEEDINGS

On September 28, 1982, after a six day interim period afforded to the defendant for trial preparation, and the preparation of both a mental examination and a pre-sentence report, the second stage of this trial, hereinafter referred to as the Sentencing Proceedings commenced pursuant to 2929.03(D). At the sentencing proceedings, the original trial jury, still fully in tact, heard additional evidence, testimony, and the arguments of respective counsel relative to the factors in mitigation of the sentence of death as well as to the aggravating circum-

stances the defendant was found guilty of committing. The mitigating factors advanced by the defendant for the consideration of the jury included those seven mitigating factors set forth in 2929.04(B).

After receiving the instructions of the court as to the applicable law in the sentencing proceedings, and upon due deliberation, the trial jury, on September 29, 1982 returned its verdict and found unanimously that the State of Ohio proved by proof beyond a reasonable doubt that the aggravating circumstances which the defendant Billy Rogers was found guilty of committing were sufficient to outweigh the mitigating factors in this case. The jury further recommended in its verdict that the sentence of death be imposed on the defendant, Billy Rogers, as mandated by the provisions of Revised Code Section 2929.03(D)(2). Thereafter, the Court continued the case until October 29, 1982 for the rendering of its opinion and the sentence of the Court.

IMPOSITION OF SENTENCE PROCEEDINGS

On October 29, 1982, the Court proceeded to impose sentence pursuant to Division (D)(3) of Revised Code Section 2929.03. On that same date, the opinion of the Court was filed. Upon consideration of relevant evidence raised at the original trial, the testimony, other evidence, and the arguments of respective counsel at the sentencing proceedings, this Court finds, by proof beyond a reasonable doubt, that the aggravating circumstances which the defendant, Billy Rogers, was found guilty of committing did outweigh the mitigating factors in the case and thus on October 29, 1982, this Court imposed the sentence of death upon the defendant, Billy Rogers.

The following is the Court's stated separate opinion setting forth the Court's specific findings as to the existence of any mitigating factors as set forth in Division B of 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the defendant Billy Rogers was found guilty of committing, and the reason why the aggravating circumstances which the defendant was found guilty of committing are sufficient to outweigh the mitigating factors.

OPINION

As previously noted, the provisions of Revised Code Section 2929.03(F) require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code and further the existence of any other mitigating factors. Section (F) of 2929.03 also requires the Court to state reasons why the aggravating circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Based upon the relevant evidence raised at trial, the testimony, other evidence, and the arguments of respective counsel the Court finds that both the State and defense counsel never suggested that any other mitigating factors, other than those set forth in 2929.04(B) should be suggested to the jury, for their consideration. Thus only those seven possible mitigating factors were advanced as being in the nature of mitigating circumstances. Those factors as set forth in the statute are as follows:

- (1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

AGGRAVATING CIRCUMSTANCES

The Court now finds that the aggravating circumstances that the defendant, Billy Rogers, was found guilty of committing are as follows:

(1) The Jurors further find and specify that the said offense was committed while Billy Rogers, alias Raymond Lee Hudson, was committing or attempting to commit kidnapping, and the said Billy Rogers, alias Raymond Lee Hudson, was the principle offender in the commission of the Aggravated Murder.

(2) The Jurors further find and specify that the said offense was committed while Billy Rogers, alias Raymond

Lee Hudson, was committing or attempting to commit rape, and the said Billy Rogers, alias Raymond Lee Hudson, was the principle offender in the commission of the Aggravated Murder.

In deliberating upon its decision in this case as required by Revised Code 2929.03(D)(3), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court has evaluated all of the relevant evidence raised at the original trial, the testimony, other evidence, and the arguments of respective counsel which had been available to the jury in its jury deliberations in each phase of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the sentencing proceedings. The evidence, and testimony were tested by the Court from the viewpoint of credibility, relevancy to the existence of mitigating factors, their qualitative and quantitative measure, and finally as to the balance between aggravating circumstances and mitigating factors.

At the outset, the Court feels it appropriate to state that its deliberations were conducted in strict accordance with its judicial oath to support and to enforce the law as written by the General Assembly and to administer justice without regard to the Court's personal views as to the propriety of the punishment prescribed by a particular statute or as to the efficacy of a particular law to deter future criminal activity. The Court's deliberation consumed significant time, and included a complete review of the evidence and the law applicable to this case. The Court's deliberations were completely dispassionate in nature, notwithstanding the high emotional impact of

this trial. The Court did not consider such sentiments as sympathy, mercy or compassion in determining the primary issue of whether the aggravating circumstances outweigh the mitigating factors.

Any plea made by this defendant for mercy can not enter into the Court's determination of the primary issue. For the Court to allow its personal sentiment to intervene and play a role in its judgment would, in effect, be tantamount to disregarding the law as written in order to avoid an unpleasant decision. The Court, in the preparation of this opinion and during the course of its deliberation has not allowed such emotions to interfere with its judgment on the facts and the law of this case.

The Court takes this one opportunity to inject a personal thought. Clearly, the death penalty is *the most severe* penalty that can ever be imposed by man upon man. It should only be imposed after the most careful and meticulous scrutiny of the facts and law have taken place. Such an evaluation of the facts and law in this case has been undertaken by this Court in reaching its decision.

The only issue which confronts this Court is stated as follows:

DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, BILLY ROGERS WAS FOUND GUILTY OF COMMITTING ARE SUFFICIENT TO OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard each of the statutory mitigating circumstances will be discussed individually.

MITIGATING FACTORS

Ohio Revised Code Section 2929.04(B) indicates that the first mitigating factor to be considered is whether or not the victim of the offense induced or facilitated it. The Court finds absolutely no evidence whatsoever to suggest that Lisa Bates in any respect induced or facilitated the offense.

Section 2929.04(B) provides that the second mitigating factor to be considered is whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. Again, the Court finds absolutely no evidence of any nature that would suggest that the offender was under duress, coercion or strong provocation.

The Court will consider the third possible mitigating factor as set forth in Section 2929.04(B) at the conclusion of its discussion of mitigating factors four, five and six.

Section 2929.04(B)(4) Ohio Revised Code suggests that the youth of the offender may be a mitigating factor to be taken into account by the Court. The Court finds that the defendant was born in August of 1940 and at the time of this trial is forty-two years of age. There is absolutely no evidence to suggest that he is a youthful offender or that his age is a factor that should be taken into account in mitigation of the sentence of death.

Mitigating factor number five as set forth in Section 2929.04(B) states that the offenders lack of a significant history of prior criminal convictions and delinquent adjudications may be taken into account in mitigation of the death penalty. The record in this case, including the exhibits offered by the defense and the testimony which the Court has considered, indicates that the Defendant,

Billy Rogers has a significant history of convictions for acts of the same or similar nature and that these convictions extend over a significant period of time. The convictions, are themselves, delineated in the record of this case. The Court therefore finds that there is a significant history of prior criminal activity of the same or similar nature and therefore the Court would be precluded from giving the defendant consideration pursuant to mitigating factor number five.

Mitigating factor number six as found in Section 2929.04(B) states:

"If the offender was a participant in the offense but not the principal offender the degree of the offenders participation in the offense and the degree of the offenders participation in the acts that led to the death of the victim; . . ."

may be taken into account as a possible mitigating factor. The Court finds in this case that there is absolutely no evidence to suggest that any other person was involved in the kidnap, rape and murder of Lisa Bates, other than the defendant, Billy Rogers. Therefore, the Court is unable to provide this defendant any consideration under mitigating factor number six.

In conclusion of the discussion thus far the Court therefore finds that, pursuant to 2929.04(B), mitigating factors number one, two, four, five and six, based upon the evidence in this case, may not be the subject for any consideration by this Court as it relates to mitigation of the penalty of death.

The Court is left therefore with consideration of possible mitigating factor number three and number seven in light of Section 2929.04(B). The statute provides in its

pertinent part that the Court shall weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background, . . .

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law:

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

The Court shall now consider the nature and circumstances of the offense, the history, character and background of the offender and mitigating factor three and seven.

The nature and circumstances of this offense appear uncontroverted by the defendant. Therefore, it will not be the Court's intention to reiterate in this opinion each and every grotesque detail of the afternoon and early evening hours preceding the death of Lisa Bates. The eyewitness testimony of her young friends and the testimony of police officers and criminalists who came upon the scene in the later hours of the evening revealed for the jury and for this Court a gruesome scenario for all who heard it. It is quite clear that Lisa Bates was located on the front steps of the home in which Billy Rogers lived in the midafternoon hours of November 14, 1981. There, in the company of three or four other young people she watched the defendant, Billy Rogers do magic tricks. Thereafter, the evidence revealed that as other youngsters drifted away to go home or were called away by their

parents she was left alone with the defendant. By some means or another, the evidence is abundantly clear that the defendant lured young Lisa to his upstairs apartment and thereafter raped and strangled her to death. In the defendant's own words, taken from the psychological evaluation prepared following the finding of guilt, "I was going to have sex with her. . .". And further he stated that young Lisa started crying and he "got her to shut up somehow, I don't know how I did it." There is no direct testimony to indicate what happened in the apartment of this defendant but the circumstances of the offense can be gleaned from the vivid testimony of State's witnesses who described bedsheets, a jar of vaseline, and the clothing of the young victim among other things in an effort to indicate the very sordid nature of the offense and its specific circumstances. One can only assume that the last moments of the life of Lisa Bates were filled with the type of horror that no human being should ever have to experience.

The history, character and background of the defendant Billy Rogers are very closely interrelated with the two remaining mitigating factors to be discussed and will be interspersed with a discussion of these specific factors in mitigation.

The Court has received such a substantial volume of material regarding the background of the defendant, Billy Rogers that it seems unnecessary in this opinion to repeat all of the pertinent factors of his background that may come into play. The Court is well aware that each and all of these documents will be a part of the record that is reviewed by higher appellate courts and therefore will simply summarize what it deems to be the most pertinent aspects of this defendants history and background.

Again it is undisputed that the defendant Billy Rogers led what must have been an aimless and unhappy life from early on. At age ten, after what seems to have been a rather stormy initial ten years of life he was sent to the Missouri State School in Marshall, Missouri. He stayed there until age twenty-two, and while living there developed significant homosexual tendencies. Upon his release from Missouri State School his life was aimless and misdirected, drifting from one place to another and becoming involved with the law time after time. Virtually all of his illegal activite arouse [sic] as a result of illicit sexual activity with minors and at no time does it appear that he received any substantial guidance or assistance for his problem. He seems to have been dealt with either by moving to another state or by being housed in one hospital or another. The evidence is very clear that throughout his wanderings he presented the picture of a mentally retarded person with very minimal skills for self support. His testing over the years placed him in a mild range of mental retardation and his ability suggested that he functioned at the average range of a fourth grader. The general picture of the defendant Billy Rogers was that of a loner who drifted in and out of trouble wherever he found himself and possessed only the minimum skills for self-care and self-preservation.

The history of wandering evidenced by the testimony and exhibits in this case brought him to Toledo in the mid 1970's. There, as a result of intervention by various social agencies and ultimately by the Common Pleas Court of Lucas County, Ohio, Mr. Rogers seemed to gather some better grip on his ability to function in society. While it is absolutely clear that he never overcame his improper sexual drives and desires, he was able to garner certain

work skills which allowed him to function in the community and to care for himself. Further, he seemed to gain some insight into the problems that drove him into trouble and he further developed an ability to deal with those problems. The evidence is clear that he successfully completed an extended period of time in the Christoff House learning to cope with and presumably solve a problem with alcoholism. Additionally his own words, spoken some very few days prior to the tragic events of November 14, 1981, lead this Court to believe that he did have insight into his problems regarding sex and children. Mr. Jeff Barnes, the defendant's witness, related a conversation with the defendant, where the defendant indicated in essence, that he knew it was wrong to have sex with children and that he must stop that activity. This conversation took place a very few days before the death of Lisa Bates.

Thus, while the Court believes that all of the records in this case indeed indicates that the defendant had a very tragic and unfortunate upbringing, that he was mentally retarded, that he had been involved in significant criminal activity in the past of a same or similar nature as that charged in this case; the Court is also satisfied that the records, testimony and evidence, reflect quite a different picture of Billy Rogers as he lived and existed in the Toledo, Ohio area at or about the time of the commission of this offense. The records, testimony and exhibits depict a man who at the time of the incidents in question was holding a job and worked regularly; who drew a paycheck, lived alone and cared for his own basic needs; who possessed a driver's license, a fishing license, purchased his own groceries and did his own laundry; and further depicted a man that had mastered the techniques of certain magic tricks.

It is true, that the defendant continued to be afflicted with mental retardation and lacked numerous social skills. However, the recitation of factors cited above which allowed him to live and work within the community and society of Toledo, Ohio, compel this Court to a conclusion that the defendant functioned as a rational human being during the period of time surrounding the criminal activity of which he has been convicted.

This is not to say that the defendant suddenly gained some additional degree of intelligence. As a caveat, this Court indicates that it can not consider the degree of the defendant's intelligence as it pertains to the issue of whether the killing of Lisa Bates was done purposefully and with specific intent to cause her death. This issue is a essential element of the offense of aggravated murder, and, as such was conclusively found to exist beyond a reasonable doubt by the trial jury when it rendered its verdict on the second count of the indictment at the guilt or non-guilt trial.

The question of the defendant's level of intelligence within the context of the sentencing proceedings can be considered only for the purpose of extenuating or reducing the degree of the defendant's blame or punishment for the crimes he committed, and would be taken into consideration as it relates to the mitigating factor number seven.

In arriving at a conclusion as to mitigating factor number three, this Court takes great solace and guidance from the decision of this jury when it determined the guilt of the defendant and elected to disregard, or find as totally insufficient, the evidence suggesting that the defendant was insane at the time of the commission of

the offense. While mitigating factor number three as found in 2929.04(B) does not absolutely correspond to the test for insanity, it certainly comes so close as to allow this Court to take guidance from the trial jury's decision.

In considering whether or not the defendant, at the time of committing the offense because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, the Court looks to the psychiatric testimony of Dr. Thomas G. Sherman, M.D. Dr. Sherman presented the most credible and compelling testimony in the case with respect to the sanity of the defendant. He summarized Mr. Rogers as an individual whose past history was replete with repeated pedophilic sexual offenses. The Defendant was shown to be consistently inconsistent with respect with what he told each examiner and it was Dr. Sherman's opinion that the inconsistencies were conscious fabrications and not due in any way to a mental illness.

Dr. Sherman further found that the actions of Mr. Rogers were entirely self-serving, very specific and not stereotyped. Dr. Sherman pointed out that the defendant had the presence of mind to utilize certain instruments and devices to both restrain his victim and make his attack more possible, all of which suggested to him, that his actions were purposeful, and that he had the knowledge that his acts were wrong. In this opinion, this Court concurs.

This Court is therefore compelled to a conclusion that there was no evidence that the offender in this case, because of a mental disease or defect, lacked sub-

stantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

In arriving at this conclusion it should be noted that the Court carefully examined the testimony of Dr. Gerd Leopoldt who was called as a defense expert witness. Upon careful examination of Dr. Leopoldt's testimony this Court is satisfied that Dr. Leopoldt, when rendering his opinion in this case, was not possessed of adequate facts to make an appropriate judgment in this case. Thus, the opinion of Dr. Leopoldt is disregarded.

The Court further carefully examined the testimony of Dr. Christopher Layne a clinical psychologist employed at the University of Toledo. While Dr. Layne appeared to this Court as a highly intelligent and reasoned professional, upon careful questioning it was quite apparent to the Court that Dr. Layne did not possess an adequate grounding in the technicalities of the question before him to render an opinion which could be deemed credible. Therefore, the testimony of Dr. Layne, as to the sanity, of this defendant, was disregarded.

The Court having now found that mitigating factor number three as found in 2929.04(B) is not a factor that this Court can or will consider it moves to a discussion finally of mitigating factor number seven. Within that provision the Court is asked to examine any other factor that may be relevant to the issue of whether the defendant should be sentenced to death. As noted earlier, the intelligence of the defendant is a factor that might be considered under this provision. Upon careful examination and evaluation of the evidence the Court finds no other significant factor, that has not already been discussed to be applicable.

The intelligence of the defendant, Billy Rogers, has never been questioned by either side in this case. It is readily apparent that the defendant is a mildly mentally retarded individual with an IQ in the general range of 68-72. It further was clear that he was not able to function as a normal worker in the market place. His limited skills directed him to menial jobs and tasks, usually under the supervision of a social agency. Nonetheless, it was also clear that he did his job regularly, received a paycheck, and cared for himself within the limits of his ability to do so.

The evidence further compels this Court to a conclusion that the defendant was quite aware of his own social idiosyncracies. He was able to discuss with his social worker counselor, Jeff Barnes, the fact that he should not have sex with children and he knew it was wrong. He further was able to follow the directives of Lewis and Nancy Linke, his landlords, not to have children in his room. It further appears to be a reasonable deduction, based upon the evidence, that in taking Lisa Bates to his room on the day in question, he carefully waited until a time when the Linkes would not be home. These factors and many more indicate that the defendant, although mentally retarded, and lacking certain social skills, possessed an intelligence that allowed him to make conscious decisions. The Court would further note in this connection the entire defense of this defendant and suggest that it was just as calculated a decision to deceive as has been most of Billy Rogers' life. The Court is fully satisfied that Mr. Rogers understood the very real likelihood of his being found not guilty by reason of insanity and his actions throughout this trial were calculated toward that hopeful end. He had in

fact been found not guilty by reason of insanity at one time in the past. Further, he was able to say to a fellow cellmate that he would plead not guilty by reason of insanity and get off. These are not the thoughts and actions of a man who is totally lacking in intelligence. As a caveat, the Court does not wish these comments to in any way reflect upon the excellent work of defense lawyers John Callahan and Ralph DeNune in this case. They performed, clearly, in the highest traditions of our bar and afforded Billy Rogers an excellent defense. The only point being made by the Court at this time is, that it did not and does not believe that Billy Rogers is some dummy who has no idea of what he is doing. This Court, based upon all of the evidence feels that Billy Rogers' actions in this case were very calculated and predetermined and that he was not acting as the result of a thoughtless animalistic drive. Rather, the Court is satisfied fully that he knew what he was doing and that he understood the ramifications of his actions.

The Court fails to see any direct or positive correlation between the defendant's IQ as determined from his performance on the various tests that have been administered to him, and are part of the record in this case, and his ability to kidnap, rape and murder Lisa Bates. The horror of the crime which was perpetrated in this instance was just as overwhelmingly devastating when committed by the academically disadvantaged defendant, Billy Rogers, as if it had been committed by a Rhodes scholar. Why should the punishment differ.

History teaches us that we are a nation of laws and not of men. We are all entitled to a fair and equal application of the law regardless of our station in life, our color or education. A person should never be held

accountable for a crime in a greater or lesser degree dependant upon the gradations of his color, difference in sex or intellectual ability. In the case at bar, it can not be said that a person with exceptionally high IQ, should be held more accountable for his actions and suffer a greater punishment for his acts than a person whose IQ is in the area of 68-72 and who belongs to a mildly retarded but socially functional category of our society. To apply a psychological-academic intelligence quotient standard in determining possible punishment for a crime would result in the imposition of an infinite multitude of disparate sentences for the commission of the same offense by different citizens under the same body of laws. Thus, we would have the unequal application of the law—a nation of men rather than a nation of laws.

This Court finds no ability to give the defendant any consideration under mitigating factor number seven as found in Section 2929.04(B) of the Ohio Revised Code.

THE SPECIFICATIONS OF AGGRAVATING CIRCUMSTANCES

The Court will next consider and evaluate the two aggravating circumstances which the jury found the defendant guilty of committing. As stated earlier the issue confronting the Court was:

DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT BILLY ROGERS WAS FOUND GUILTY OF COMMITTING OUTWEIGH THE MITIGATING FACTORS?

The aggravating circumstances as set forth in Count two of the indictment, and which the defendant was found guilty of are as follows:

(1) . . . that said offense was committed while Billy Rogers, aka, Raymond Lee Hudson, was committing or attempting to commit kidnapping, and;

(2) . . . that the said offense was committed while Billy Rogers, aka, Raymond Lee Hudson, was committing or attempting to commit rape, . . .

The crimes of rape and kidnapping were deemed by the General Assembly of the State of Ohio to be among the most serious when the general revision of the criminal code was made on January 1, 1974. For sake of punishment, these crimes are second only in severity to the crime of murder. These two crimes separately stated are first degree felonies. Further, in Section 2929.04 of the Ohio Revised Code the General Assembly mandated the imposition of the death penalty for an aggravated murder during the commission of such offenses.

In the guilt - non-guilt trial, and in the sentencing proceedings, the statements, arguments of counsel and the evidence, never denied in any respect that the defendant was the sole and principle perpetrator of the offenses charged in the indictment. A complete review of the evidence pertaining to Court [sic] two and the aggravating circumstances which support the two specifications of kidnapping and rape reveals to this Court that said crimes were committed with careful planning, prior thought and calculation, total criminal motivation, and an obvious intent to kidnap, rape and murder Lisa Bates. The sadly abused body of the victim, the use of certain paraphernalia to assist the defendant in his lude [sic] act, and all indicia of physical evidence introduced at the trial confirm this conclusion.

There is absolutely no evidence in this case to indicate that the actions of the defendant were anything but the actions of a malevolent person bent on rape, kidnapping and murder.

Upon a full and complete review of all of the stated mitigating factors this Court cannot find even one which clearly and or directly mitigates the aggravating circumstances just discussed.

CONCLUSION

Upon full careful and complete scrutiny of the mitigating factors set forth in the statute and which were set forth as proposed mitigating circumstances or factors in this case the Court is compelled to a finding that not a one of the mitigating factors advanced can in any way shape or form be considered by this Court as outweighing the aggravating circumstances which exist and have been proven beyond a reasonable doubt. In fact, the complete consideration which the Court has given to all factors in this case leads the Court to the additional conclusion that not only do the aggravating circumstances exist beyond a reasonable doubt as found by this jury but further, the aggravating circumstances outweigh the mitigating factors advanced by beyond a reasonable doubt.

The Court therefore finds as required by Section 2929.03(D)(3) that the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors advanced by the defendant.

It is the opinion of this Court that the recommendation of the trial jury be adopted and that the sentence of death be imposed upon the defendant Billy Rogers.

Respectfully submitted,

/s/ PETER M. HANDWORK
Judge

EDITOR'S NOTE

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ORIGINAL
NO. 87-555

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Supreme Court, U.S.

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SUPREME COURT, U.S.

THE STATE OF OHIO,

Petitioner,

vs.

BILLY ROGERS,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

On Question No. I

Retroactive Effect Was Properly Given to the Wainwright v. Greenfield Ruling.

In arguing that the ruling in Wainwright v. Greenfield, 474 U.S. ___, 88 L. Ed. 2d 623 (1986), should not have been retroactively applied by the Ohio Supreme Court to this case, Petitioner ignores this Court's recent pronouncement on retroactivity in Griffith v. Kentucky, 479 U.S. ___, 93 L. Ed. 2d 649 (1987).

Griffith held that a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

This case was pending on direct review at the time the Greenfield ruling was announced.

Respondent had been convicted of aggravated murder and sentenced to death on October 29, 1982 (App. A125). The judgment and sentence was affirmed by the Court of Appeals (App. A123) and by the Supreme Court of Ohio. 17 Ohio St. 3d 174 (1985), (App. A59.) This Court granted Respondent's petition for a writ of certiorari on December 2, 1985, and remanded the case for "further consideration in light of Caldwell v. Mississippi, 472 U.S. 320 (1985)." 474 U.S. 1002 (1985), (App. A30.) The Greenfield decision was released six weeks later on January 14, 1986.

On the announcement of Greenfield, Respondent moved the Ohio court to expand the scope of its review on remand to include consideration of the effect of that ruling. Although the motion was granted, the court in its subsequent decision declined to address the issue on its merits. 28 Ohio St. 3d 427, 434 (1986), (App. A24-25.) Respondent's motion for rehearing was denied, but about three months later, on its own motion, the

court returned this case to its docket "in order [to] give proper consideration to the effect that Wainwright v. Greenfield may have upon this case". (App. All.) In its subsequent decision, announced August 12, 1987, the court held that the Greenfield ruling was controlling and in an unanimous opinion reversed its earlier judgment. 32 Ohio St. 3d 70 (1987), (App. Al.)

The Supreme Court of Ohio commenced this latest opinion by reciting that the case was on "Appeal from the Court of Appeals for Lucas County," a clear indication that the court regarded the case as coming before it from the lower court on direct review. Ibid. Under the Griffith holding, retroactive application of the Greenfield ruling was proper. Petitioner's Question No. I, therefore, does not present a substantial federal question for review by this Court.

On Question No. II

This Is Not a Federal Question.

Question No. II is not a federal question cognizable by this Court on a writ of certiorari. It is merely an assertion that the Supreme Court of Ohio erred in failing to view Petitioner's use of Respondent's silence to discredit his defense of insanity as harmless error. Petitioner's argument offers no special and important reasons for the Court to accept this question for review. Title 28, Section 1257(3), United States Code; Rule 17.1, Rules of the Supreme Court of the United States.

On Question No. III

This Is Not a Federal Question.

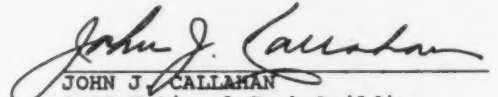
Question No. III also is not a federal question warranting review by this Court, but simply a claim that the Supreme Court of Ohio applied the Greenfield ruling to an inappropriate "fact

situation." Again, no special and important reasons for review are urged. Title 28, Section 1257(3), United States Code; Rule 17.1, Rules of the Supreme Court of the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,


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